

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Western Wireless Corporation Petitions)	
for Designation as an Eligible)	CC Docket No. 96-45
Telecommunications Carrier to Provide)	
Services Eligible for Universal Service)	
Support in Wyoming)	

COMMENTS OF U S WEST COMMUNICATIONS, INC.

Steven R. Beck
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2736

Attorney for

U S WEST COMMUNICATIONS, INC.

Of Counsel,
Dan L. Poole

December 17, 1999

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY.....	1
II. THE PETITION MUST BE DENIED BECAUSE WWC ADMITTEDLY IS NOT PRESENTLY OFFERING OR ADVERTISING ITS UNIVERSAL SERVICE PACKAGE ANYWHERE IN WYOMING, NOR HAS IT EVEN SUBMITTED EVIDENCE THAT IT HAS THE CAPABILITY TO DO SO	2
A. WWC Does Not Currently Offer And Advertise A Basic Universal Service Package Throughout Its Proposed Service Areas	3
B. WWC Provides No Evidence That It Can Provide Universal Service Throughout Its Intended Service Areas	8
III. THE PUBLIC INTEREST IS A RELEVANT FACTOR IN ALL SERVICE AREAS.....	10
IV. UNDER THE PUBLIC INTEREST REQUIREMENT, THE COMMISSION SHOULD CONSIDER AFFORDABILITY, UNBUNDLING, QUALITY, RELINQUISHMENT AND LANDLINE SUBSTITUTABILITY, AMONG OTHERS.....	12
A. Affordability Is At The Heart Of Universal Service And Must Therefore Be Considered As Part Of The Public Interest Requirement.....	12
B. To Preserve The Public Interest In Not Subsidizing Cream- Skimming, The Commission Should Require That WWC Offer At Least One Unbundled Universal Service Offering	13
C. Quality Is An Indisputable Element Of The Public Interest	15
D. Due To The Existence Of An Absolute Right To Relinquish, The Commission Must Apply Landline Substitutability As Part Of The Public Interest Requirement	15
V. CONCLUSION.....	17

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Western Wireless Corporation Petitions)	
for Designation as an Eligible)	CC Docket No. 96-45
Telecommunications Carrier to Provide)	
Services Eligible for Universal Service)	
Support in Wyoming)	

COMMENTS OF U S WEST COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY

U S WEST Communications, Inc. ("U S WEST") welcomes the opportunity to provide the Federal Communications Commission ("Commission") comments on Western Wireless Corporation's ("WWC") Petition for Eligible Telecommunications Carrier status in the state of Wyoming.¹ As U S WEST has maintained across its region, it is more than happy to share the eligible telecommunications carrier ("ETC") burden with those who can and will to shoulder it. The reason U S WEST submits these comments is that WWC has plainly failed to meet the criteria and therefore has not shown that it can shoulder the ETC burden. In other words, WWC wants the benefits of universal service funding without the burdens.

The Petition suffers from the following flaws:

1. WWC is attempting a bait-and-switch. It states it offers the supported services, but not in the form of a universal service offering and not via the wireless local loop ("WLL") technology it intends to use for universal service.

¹ Public Notice, Western Wireless Corporation Petitions for Designation as an Eligible Telecommunications Carrier to Provide Services Eligible for Universal Service Support in Wyoming, CC Docket No. 96-45, DA 99-2511, rel. Nov. 10, 1999. Petition for ETC Designation filed Sep. 29, 1999 ("Petition").

On the other hand, WWC refused to provide any evidence regarding the WLL technology or finances;

2. WWC is not actually offering or advertising a universal service offering throughout the service area (nor has it even made a showing as to its alleged capacity to do so);
3. WWC did not even address the public interest requirement in non-rural areas and it made an inadequate showing as to rural service areas;
4. WWC provided no evidence or even allegations that its universal service offering would be affordable;
5. WWC did not commit to offer at least one unbundled, bare bones universal service offering; and
6. WWC ignored the landline substitutability and quality requirements.

Because WWC has on the face of its Petition and affidavit failed just about every requirement, the Petition should be denied.

II. **THE PETITION MUST BE DENIED BECAUSE WWC ADMITTEDLY IS NOT PRESENTLY OFFERING OR ADVERTISING ITS UNIVERSAL SERVICE PACKAGE ANYWHERE IN WYOMING, NOR HAS IT EVEN SUBMITTED EVIDENCE THAT IT HAS THE CAPABILITY TO DO SO**

Before an applicant for ETC designation can obtain federal funding, the Commission must determine that the applicant meets all of the Universal Service obligations which Congress requires of ETCs. The obligations are specified at Sections 214(e) and 254 of the Act. Those obligations include offering and advertising throughout the service area. WWC has two specious theories as to why it meets this requirement despite its admitted failure to actually offer and advertise a package of universal service using WLL. First, WWC relies on its alleged offering of the nine supported services. However, it admits that it does not offer them in a package or through its universal service technology, WLL. Second, it touts its good

intent to offer a WLL universal service package of some sort at some unknown price, but only after it obtains ETC status. These theories constitute a classic bait-and-switch and make a mockery of the statute.

A. WWC Does Not Currently Offer And Advertise A Basic Universal Service Package Throughout Its Proposed Service Areas

The first deficiency of the application on the merits is the undisputed fact that WWC does not currently offer a basic universal service package. Neither does WWC state whether it is using handheld or WLL CPE/technology. If WWC is relying on handheld CPE, then any offering would lack the requisite quality and reliability needed for universal service. As WWC has testified, conventional cellular is inappropriate for universal service.² The main reason is that the handheld units have very little in the way of power (.5 watts) compared to the WLL units (3 watts). This manifests itself in a substantially lessened ability to receive a viable signal. This problem is especially acute in high-cost areas. At the same time, handheld cellular service offers a high degree of mobility, which is not on the Commission's list of supported services and should not be supported with public funds.

Both Section 214(e)(1)³ and Commission Orders and regulations⁴ state that, prior to being designated an ETC, a carrier "shall" offer a universal service package

² See In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, TC98-146, Hearing Transcript at 39 (attached hereto as Exhibit A).

³ Congress, made its position clear in Section 214(e)(2): "A State commission . . . shall . . . designate more than one common carrier as an eligible telecommunications carrier . . . , so long as each additional requesting carrier meets the requirements of paragraph (1)." (Emphasis added.) If Congress intended carriers to be able to obtain ETC status based solely on their *intent* to meet the

throughout the service area. State commissions agree.⁵ So does the only federal appeals court to address the issue.⁶

strictures of Section 214(e)(1), then it would have said so. Instead, it used the present tense (“meets”), and it made clear that Section 214(e)(1) contains “requirements” for ETC status, not mere “aspirations,” as WWC would have it.

⁴ The Commission also interprets “shall” as “must,” which of course is the usual statutory meaning of the term:

Requirement to offer all designated services. An eligible telecommunications carrier must offer each of the services set forth in paragraph (a) of this section in order to receive federal universal service support.

47 C.F.R. § 54.101(b) (italics in original; underlining added). Also, in its Seventh Report and Order, the Commission again used the present tense: “All carriers . . . that provide the supported services . . . are eligible for ETC status. . . .” In the Matter of Federal State Joint Board on Universal Service, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 8078, 8113 ¶ 72 (1999); pet. for rev. pending sub nom. Vermont Department of Public Service v. FCC, No. 99-60530 (5th Cir. 1999).

⁵ The only state commission and the only state ALJ to rule on the merits of a WWC application agree. The South Dakota Commission recently rejected a WWC application because, as in Wyoming, WWC did not presently have a universal service offering for the Commission to assess. In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, TC98-146, ¶ 18 (SDPUC, 5/19/99) (Findings of Fact and Conclusions of Law; Notice of Entry of Order; hereinafter referred to as South Dakota Order; attached hereto as Exhibit B). This was the basis of the rejection of WWC’s Oklahoma application by an ALJ as well. Application of GCC License Corporation for Certification as an Eligible Telecommunications Carrier pursuant to the Telecommunications Act of 1996, Cause PUD No. 980000470 (OCC, 5/13/99) (Official Transcript of Proceedings, Oral Ruling of the ALJ; attached hereto as Exhibit C). In addition, the Nevada Public Utilities Commission (“Nevada PUC”) also rejected WWC’s two consecutive petitions for lack of evidence. See letter to Gene DeJordy, WWC from Geoff Helfer, Nevada PUC, dated Sep. 23, 1998 (attached hereto as Exhibit D) and letter to Gene DeJordy, WWC from Jennifer Higgins, Nevada PUC, dated Dec. 15, 1998 (attached hereto as Exhibit E).

WWC can be expected in its comments to tout aspects of the recent ruling from the State of Minnesota Public Utilities Commission. See Order Granting Preliminary Approval and Requiring Further Filings in P5695/M-98-1285, granting

Perhaps the most persuasive authority however is in the Commission's own rules and cases on the topic. The Commission's ETC designation procedures confirm that the statute requires a showing that the applicant presently offers a universal service offering.⁷ Moreover, there is precedent in cases of actual ETC applications adjudicated at the Commission that is on point and that indisputably

preliminary approval of Minnesota Cellular Corporation's Petition for Designation as an ETC, dated Oct. 27, 1999 (Minnesota Order; attached hereto as Exhibit F). However, there are several salient points WWC is apt not to point out about that decision. The first is that it is not final and that U S WEST, the independents and even MCC's affiliate have moved for reconsideration. Second, the application was not granted outright, but instead received only "preliminary" and "conditional" approval because of MCC's failure to provide evidence on numerous issues including affordability and quality. Finally, it was silent on the issue of the public interest requirement in non-rural areas.

⁶ The Fifth Circuit has weighed in on the issue in its recent decision regarding the Commission's First Report and Order on universal service, Texas Office of Public Util. Counsel v. FCC, 183 F.3d 393 (1999) ("Texas OPUC"); pets. for reh'g. denied. In the portion of the opinion granting states the ability to impose additional ETC criteria, the Court clarified the meaning of "shall." Id. at 418. The Court found that: "Generally speaking, courts have read 'shall' as a more direct statutory command than words such as 'should' and 'may.'"⁶ Id.

⁷ Specifically, the Commission's procedures state:

[C]arriers seeking designation . . . are instructed to file a petition that sets forth the following information: . . .

2. A certification that the petitioner provides all services designated for support . . .;
3. A certification that the petitioner offers the supported services; and
4. A description of how the petitioner "advertise[s]. . . the [supported] services. . . ."

Public Notice, Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, 12 FCC Rcd. 22947, 22948-49 (1997) ("FCC Procedures") (emphasis added). Thus, these procedures leave no doubt that petitioners must offer and advertise concurrently with their petition.

requires that petitioners currently offer and advertise in order to gain ETC status.⁸

In Saddleback, the Common Carrier Bureau (“CCB”) followed the FCC Procedures and held that “to be designated an ETC a common carrier must, throughout its service area: (1) offer all of the services designated . . . and (2) advertise . . . such services. . . .”⁹ Note that the CCB did not require only an intention or a capability to offer and advertise; it required the applicant to currently offer and advertise. Fort Mojave confirmed what is already known from the FCC Procedures and Saddleback: “to be designated an [ETC], a common carrier must, throughout its service area: (1) offer all of the services designated . . . and (2) ‘advertise . . . such services.’”¹⁰ The Commission confirmed this rule even more recently in its Further Notice of Proposed Rulemaking.¹¹

WWC attempted in its Petition to turn Fort Mojave to its advantage by focusing on the “will be able to offer” language in the opinion: “Based on the uncontested record before us, we find that, subject to the extension of time granted

⁸ In the Matter of Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, 13 FCC Rcd. 22433 (1998) (“Saddleback”); In the Matter of Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Telecommunications, Inc., and Tohono O’odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Memorandum Opinion and Order, 13 FCC Rcd. 4547 (1998) (“Fort Mojave”).

⁹ Saddleback, 13 FCC Rcd. at 22436 ¶ 8 (emphasis added).

¹⁰ Fort Mojave, 13 FCC Rcd. at 45499-49 ¶ 2 (emphasis added). See also id. at 4551 ¶ 6

¹¹ In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Further Notice of Proposed Rulemaking, CC Docket No.

above, each of the petitioners offers, or will be able to offer all of the services designated for support by the Commission.”¹² However, WWC shamelessly took the “will be able to offer” language out of context -- as it has done many times before. By doing so, the language becomes misleading. To provide the proper context, one must observe that the same sentence containing this language also states that the ruling was “subject to the extension of time granted above.”¹³ The extension of time pertained to one petitioner’s current inability to provide toll blocking or toll limitation.¹⁴ Because that petitioner had just “recently” commenced service, and its switching equipment could not provide toll blocking or limitation, and it represented it would upgrade its equipment and offer toll limitation in a “short time frame,” the CCB granted the petitioner a very brief extension of time of less than six months to upgrade and offer toll limitation.¹⁵ Thus, the “or will be able to offer” language pertains only to this fact-specific situation in which a petitioner is currently offering all but one of the nine supported services, and its ETC status is conditioned on its offering the last service, toll limitation, within a very short timeframe. In the case at bar, WWC does not presently offer its proposed WLL universal service package or any portion of it at all. Nor has it asked for an extension based on technical inability. It simply wants the benefits before the

96-45, FCC 99-204, rel. Sep. 3, 1999 ¶ 73.

¹² Fort Mojave, 13 FCC Rcd. at 4553 ¶ 11.

¹³ Id.

¹⁴ Id. at 4553 ¶ 10

¹⁵ Id.

burden, but the statute requires the benefits to follow the burden. Thus, Fort Mojave is of no help to WWC.

The foregoing alone requires denial of the Petition as a matter of law. However, for the sake of completeness, U S WEST will debunk WWC's other "reasons" to grant ETC status merely on good intentions.

B. WWC Provides No Evidence That It Can Provide Universal Service Throughout Its Intended Service Areas

Even if WWC was correct that it is entitled to ETC status if it shows it is able to offer and advertise a universal service package throughout the service area, its Petition still fails for lack of a scintilla of evidence in its favor. In *dicta*, the South Dakota Commission went on to point out that WWC unreasonably refused to provide even a financial plan to support its assertion that it could offer universal service throughout the service area despite its applications in 13 other states.¹⁶ The same holds true here.

Not only does WWC not offer a universal service package, it does not even provide evidence that it can provide universal service throughout the service areas for which it is applying. WWC's affidavit does not even mention WLL customer premises equipment ("CPE") and technology and merely states the WWC "will" offer a universal service package.¹⁷ WWC has refused to provide evidence regarding the following key factors:

- the common phenomenon of service gaps or black holes;¹⁸

¹⁶Exhibit B, South Dakota Order ¶¶ 20, 24.

¹⁷ See Petition at Appendix C, Affidavit of Gene DeJordy.

¹⁸ It is very expensive to add capacity, e.g., \$200,000 per tower and at least \$400 per

- a map of its current and intended network coverage both legal and actual, preferably a topographical map (revealing the many obstacles in the state of Wyoming for cellular signals);
- the current traffic and blocking limits of its network and how it will weather the significantly increased burdens it will face if WWC is a successful ETC;
- a financial plan, budget or any other evidence showing WWC has the monetary wherewithal to carry out its beneficent intent at an affordable price; and
- a technical or engineering model or plan describing how WWC will implement its good intent.¹⁹

The capacity to offer and advertise throughout is absolutely critical to ETC status. As noted, Section 214(e)(1) mandates an applicant to presently offer universal service throughout its intended service area. Moreover, because of the Section 214(e)(4) right of relinquishment, WWC could easily become the sole ETC. In other words, ETCs have replaced the now defunct notion of carrier-of-last-resort (“COLR”).²⁰ WWC has not demonstrated that it can live up to this obligation, and its Petition must therefore be denied.

customer for CPE. We also know from the Petition that WWC has made similar applications in at least 12 other high-cost states. See Petition at 2 n.4.

¹⁹ It was just this sort of lack of evidence that confirmed the South Dakota Commission’s rejection of WWC’s application there. Exhibit B, South Dakota Order ¶¶ 22-25.

²⁰ COLR is a notion deriving from the old regulatory compact whereby local providers accepted the duty to provide affordable service throughout their regions in return for protection of their monopolies. Now, of course, governmental bodies wisely have abandoned their side of the deal in favor of a policy to develop competition. That wise move, however, has consequences -- a material breach excuses performance. In other words, the former monopoly providers no longer must provide affordable service throughout their regions absent another regulatory compact. A new, explicit regulatory compact has been put in place by Section 214(e)(1), and it replaces COLR: if one accepts the benefits of ETC status in the

III. THE PUBLIC INTEREST IS A RELEVANT FACTOR IN ALL SERVICE AREAS

WWC wrongly presupposes that the Commission will misinterpret the Act as it does to not require a public interest showing in non-rural areas. In addition, WWC's attempt at a showing in rural areas falls woefully short because it focuses solely on competition.

Section 214(e)(1) is operative for every service area included in an ETC application. As noted, it triggers the evaluation of the applicant's supported services to ensure that its ETC eligibility is in accordance with all of the principles enumerated in Section 254(b). Those principles expressly include "the protection of the public interest, convenience, and necessity."²¹ U S WEST admits that the last sentence of Section 214(e)(2) does raise some ambiguity regarding this issue. However, any ambiguity is erased by the following: the rest of Section 214(e)(2), the Fifth Circuit's interpretation of Section 214(e)(2), the arbitrariness of the distinction urged by WWC and the absurdity of expecting a Commission to ignore the public interest in any proceeding without an unambiguous Congressional direction to do so.

First, Section 214(e)(2) in relevant part states that:

[C]onsistent with the public interest, convenience, and necessity, the State commission, . . . shall, [in the case of a service area not served by a rural carrier], designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State

form of universal service support, one must provide affordable service throughout the service area on request.

²¹ 47 U.S.C. § 254(b)(7).

commission, so long as each additional requesting carrier meets the requirements of paragraph (1).

(Emphasis added.) This confirms that public interest is a requirement as to areas not served by rural carriers. In Texas OPUC, the Fifth Circuit confirmed this interpretation: “The second sentence then confers discretion on the states to designate more than one carrier in rural areas, while requiring them to designate eligible carriers in non-rural areas consistent with the ‘public interest’ requirement.”²²

Second, the distinction hoped for by WWC is hopelessly arbitrary, constituting unreasonable discrimination against non-rural carriers and their customers. Under WWC’s view, two equally rural and high-cost neighbors who are served by different carriers are treated differently. The one served by a rural carrier receives the benefit of a public interest ETC requirement, while the neighbor served by a non-rural carrier does not get the benefit of such a review. Congress would not have imposed such unfair discrimination without a clear and unambiguous statement.

Third, the public interest is the very *raison d’etre* of the Commission. Every decision it makes is influenced, properly, by the public interest. In its jurisdiction, it is the guardian of the public interest. Against this background, one certainly cannot expect the Commission to turn a blind eye to the public interest in the absence of a clear Congressional command to do so. No such command exists.²³

²² Texas OPUC, 183 F.3d at 418 (emphasis added).

²³ The Minnesota Commission agreed in its recent ruling regarding a WWC affiliate.

Consequently, the Commission here must consider public interest factors (such as affordability, unbundling, quality, landline substitutability, unadorned package, etc.), even as to U S WEST's service areas.

IV. UNDER THE PUBLIC INTEREST REQUIREMENT, THE COMMISSION SHOULD CONSIDER AFFORDABILITY, UNBUNDLING, QUALITY, RELINQUISHMENT AND LANDLINE SUBSTITUTABILITY, AMONG OTHERS

A. Affordability Is At The Heart Of Universal Service And Must Therefore Be Considered As Part Of The Public Interest Requirement

WWC's Petition completely ignores affordability. Yet, the very first principle of universal service specified in the 1996 Act incorporates affordability: "Quality services should be available at just, reasonable, and affordable rates."²⁴ This principle is directly applicable to ETC determinations regardless of the public interest requirement pursuant to the directive in Section 214(e)(1) that ETC determinations be made "in accordance with section 254." Obviously, therefore, it is a necessary part of the public interest inquiry.²⁵ WWC's failure to attempt a showing or even reveal its price is therefore fatal to its application.²⁶

Minnesota Order at 19-20.

²⁴ 47 U.S.C. § 254(b)(1).

²⁵ Again, the Minnesota Commission agreed. Minnesota Order at 6, 11, 20-21.

²⁶ WWC has, in the past, erroneously claimed that the Texas OPUC decision stated that the Section 254(b) principles, of which affordability is one, cannot be ETC criteria. The Texas OPUC court did no such thing. Although the Court did state that the Section 254(b) principles were indeed principles, it did not have occasion to, nor did it, eliminate them from the ETC test. The quotes in WWC's Opening Brief were taken out of context and applied to the adequacy of the Commission's cost model and the Commission's authority to prohibit disconnecting local services, not whether the Section 254(b) principles can form the basis of ETC criteria. Texas

B. To Preserve The Public Interest In Not Subsidizing Cream-Skimming, The Commission Should Require That WWC Offer At Least One Unbundled Universal Service Offering

U S WEST has consistently pointed out the need to mandate ETCs to offer at least one unadorned universal service offering to prevent the misuse of universal service support to aid cream-skimming. The Texas OPUC Court agreed that this was the better policy, stating:

We agree that the statute's plain language does not reveal Congress's unambiguous intent. It is not evident, however, that the FCC's interpretation of the statute meets even the minimum level of reasonability required in step-two review.

Section 214(e)(1) plainly requires carriers receiving universal service support to offer such supported services to as many customers as possible. Thus, an eligible carrier must offer such services "throughout the service area" and "advertise the availability of such services." This requirement makes sense in light of the new universal service program's goal of maintaining affordable service in a competitive local market. Allowing bundling, however, would completely undermine the goal of the first two requirements, because a carrier could qualify for universal service support by simply offering and then advertising expensive, bundled services to low-income customers who cannot afford it.²⁷

OPUC, 183 F.3d at 411, 421.

WWC has also frivolously contended in other proceedings that affordability review of its universal service offerings is preempted by Section 332(c)(3)(A). Suffice it to say that Section 332(c)(3)(A) is not a bar for two separate and independent reasons. First, that subsection applies only to states, not to the Commission. Moreover, mere affordability review of only universal service offerings stops short of full blown "rate regulation," which is what the statute preempts. Id. at 432.

²⁷ Id. at 420.

The Court even went on to label the Commission's interpretation -- that such a requirement was not proper -- "unreasonable."²⁸

The Court nevertheless reluctantly held that the Commission had not acted unlawfully in not imposing such a requirement. The Court made clear its "decision is a close one."²⁹ Moreover, the holding must be fully understood as a product of two factors. First, the standard of review was extremely low. To reverse, the Court could not simply believe the Commission had made a mistake; rather, it must find that the Commission's view was "'arbitrary, capricious,' [or] 'manifestly contrary to the statute.'"³⁰ Second, the saving grace, found the Court, was an inchoate commitment by the Commission to terminate support to cream-skimmers.³¹ In other words, because the Commission did not completely ignore the cream-skimming problem, it felt constrained to affirm.

However, just because the Court affirmed does not mean that this Commission should not revisit its misguided decision. As U S WEST and the Fifth Circuit have demonstrated, the unadorned package requirement is indeed necessary to protect the public interest, and the Commission should reverse course and approve of its use. In this case, this requirement has been failed and the Petition therefore must be denied.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ See id.

C. Quality Is An Indisputable Element Of The Public Interest

As noted above, the very first principle of universal service identified in the 1996 Act incorporates quality of service. 47 U.S.C. § 254(b)(1).³² Thus, it cannot be seriously disputed that it must be considered as part of the public interest requirement.³³ Nevertheless, WWC's Petition is silent on this point.

D. Due To The Existence Of An Absolute Right To Relinquish, The Commission Must Apply Landline Substitutability As Part Of The Public Interest Requirement

The Act allows an established ETC to relinquish its designation (and relinquish operations in the service area) upon the designation of another carrier as an ETC. Pursuant to the Act:

A State Commission . . . shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advanced notice to the [Commission] of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the [Commission] shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The [Commission] shall establish a time, not to exceed one year after the

³² Like affordability, quality is an ETC criterion regardless of the public interest requirement by virtue of Section 214(e)(1)'s requirement that ETC determinations be made "in accordance with section 254."

³³ The Minnesota Commission agreed with this proposition as well. Minnesota Order at 10, 20.

[Commission] approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.³⁴

Under 47 U.S.C. Section 214(e)(1), an ETC is required to offer the services that are supported by the federal universal support mechanisms under Section 254(c) throughout the entire service area for which the designation is received. An ETC must provide complete coverage even if another carrier within the same exchange has received ETC designation. Thus, Sections 254 and 214(e) operate in concert to spread the erstwhile unilateral obligation to provide universal service among all ETCs within a designated area and to give the incumbent local exchange carrier the option to be released of that responsibility entirely if a second ETC is designated within the same area.

If there are multiple ETCs in a service area and one ETC seeks to relinquish its ETC status in that area, the Commission is required to allow it to withdraw. That withdrawal places the responsibility for serving the entire area squarely and solely upon the remaining ETC(s).³⁵ This requires the Commission to evaluate closely the applicant's ability to offer supported services if it were to become the sole provider of such services in the service area, i.e., "substitutability." Because an ETC is required under federal law to provide supported services to any customer who requests it within the designated area, the Commission must of necessity evaluate the possibility that the ETC might become the only ETC provider in a

³⁴ 47 U.S.C. § 214(e)(4) (emphasis added).

³⁵ Minnesota Order at 18.

particular exchange. This “substitutability” assessment is critical to a full evaluation of an ETC application.

Moreover, pursuant to the Act, each ETC applicant must demonstrate an ability to provide services throughout the designated service areas by using its own facilities, or a combination of its own facilities and resale. An ETC applicant must have the ability to construct new facilities, if that would be necessary to serve a requesting customer. The ETC cannot rely upon the incumbent, or another ETC, to build the facilities in lieu of placing its own.

WWC ignored this requirement as well. Consequently, the Petition must be denied on this ground too.

V. CONCLUSION

For the reasons discussed above, the Commission should deny WWC’s Petition for lack of a universal service offering or even a showing of capacity to offer and advertise a universal service offering throughout its proposed service areas. Absent dismissal, the Commission should enforce the offer-and-advertise

throughout requirement as well as the public interest requirements of affordability, quality, unbundling, and landline substitutability and deny ETC status.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.

By: Steven R. Beck
Steven R. Beck
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2736

Its Attorney

Of Counsel,
Dan L. Poole

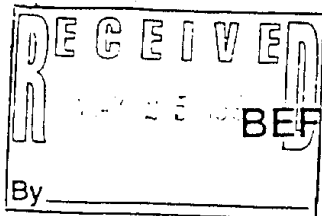
December 17, 1999

EXHIBIT A

Page 1		Page 4	
1	THE PUBLIC UTILITIES COMMISSION	1	I N D E X
2	OF THE STATE OF SOUTH DAKOTA	2	Witness Page
3		3	Gene DeJordy 16
4		4	Christopher Hickman 142
5	IN THE MATTER OF THE FILING BY	5	E X H I B I T S
6	GCC LICENSE CORPORATION FOR	6	Page
7	DESIGNATION AS AN ELIGIBLE		
8	TELECOMMUNICATIONS CARRIER		
9			
10	HEARD BEFORE THE PUBLIC UTILITIES COMMISSION		
11	PROCEEDINGS: December 17, 1998	7	1 Application
12	9:00 A.M.	8	2 DeJordy Testimony
13	Room 412, Capitol Building	9	3 Kirkpatrick Testimony
14	Pierre, South Dakota	10	4 Johnson Testimony
15	PUC COMMISSION: Jim Burg, Chairman	11	5 Teitzel Testimony
16	Laska Schoenfelder, Commissioner	12	6 Hickman Testimony
17	Pam Nelson, Commissioner	13	7 SDITC Map
18	COMMISSION STAFF	14	8 Dorgan Statement
19	PRESENT: Rolayne Ailts West	15	9 GCC Map
20	Camron Hoseck	16	10 USW Stipulation
21	Harlan Best		
22	Gregory A. Rislov		
23	Steve Weyman		
24	Reported by: Lori J. Grode, RMR		
25			
1	A P P E A R A N C E S	1	P R O C E E D I N G S
2	For US West: Thomas J. Weik	2	(EXHIBITS NO. 1-9 WERE MARKED FOR
3	P.O. Box 5015	3	IDENTIFICATION.)
4	Sioux Falls, SD 57117-5015	4	CHAIRMAN BURG: I will begin the hearing for
5	and Todd Lundy	5	Docket TC98-146. In the Matter of the Filing by GCC
6	1801 California Street, Suite 5100	6	License Corporation for Designation as an Eligible
7	Denver, CO 80202	7	Telecommunications Carrier.
8	For GCC: Mark J. Ayotte	8	The time is approximately 9:00 a.m. The date
9	332 Minnesota Street	9	is December 17, 1998; and the location of the hearing
10	St. Paul, MN 55101	10	is Room 412, State Capitol Building, Pierre, South
11	and Steven W. Sanford	11	Dakota. I am Jim Burg, Commission Chairman.
12	120 North Phillips Avenue	12	Commissioners Laska Schoenfelder and Pam Nelson are
13	Sioux Falls, SD 57102	13	also present.
14	For SDITC: Richard D. Colt	14	I am presiding over this hearing. The
15	P.O. Box 57	15	hearing was noticed pursuant to the Commission's Order
16	Pierre, SD 57501	16	for a Notice of Hearing issued October 27, 1998. The
17		17	issue at this hearing is whether GCC should be granted
18		18	designation as an eligible telecommunications carrier
19		19	for all the exchanges contained within all of the
20		20	counties in South Dakota.
21		21	All parties have the right to be present and
22		22	to be represented by an attorney. All persons so
23		23	testifying will be sworn in and subject to
24		24	cross-examination by the parties. The Commission's
25		25	final decisions may be appealed by the parties to the

<p style="text-align: right;">Page 37</p> <p>1 Commission hasn't -- did not define initially what 2 local usage meant. That would apply to wire lines or 3 its wireless customer carriers. So what they did in 4 this proceeding is they undertook an investigation to 5 see should they quantify what local usage means. That 6 would apply to wire line carriers as well as wireless. 7 Now, for the most part, wire line carriers do not offer 8 measured service any more, but to the extent that they 9 did, the local usage would apply to them as well in 10 setting a minimum amount of local usage is and would 11 apply to them as well. 12 Q. But they did -- would you agree that in their 13 order they actually referenced specifically a need to 14 do that for wireless providers? 15 MR. AYOTTE: Counsel, do you have a copy of 16 it you would like to share with the witness? 17 MR. COIT: Yes. 18 MR. AYOTTE: Thank you. 19 Q. For the record, I'm referring to the order 20 previously mentioned, FCC 98-278 and I would refer you, 21 Mr. DeJordy, to paragraph 50. 22 COMMISSIONER SCHOENFELDER: Is that an order 23 or proposed rule making? 24 MR. COIT: Well, I think is it further notice 25 of proposed rule making.</p>	<p style="text-align: right;">Page 39</p> <p>1 minute of an incoming call is free or there may be some 2 other offerings like that. But for the most part -- 3 Q. Will this change with the universal service 4 offering, or will it still be really not strictly a 5 called party based service? 6 A. Well, if you provision the service similar to 7 the way we provision universal service in Nevada, 8 unlimited local usage, and it doesn't matter if it's 9 incoming or outgoing. If you provision the service as 10 a CMRS conventional cellular service offering where you 11 pay for incoming as well as outgoing calls, then, you 12 know, then I guess you would -- you know, the price 13 would be based on the number of minutes. But I think 14 realistically, I just don't understand, you know, or 15 see how the company could get universal service 16 customers if it provisioned it as a cellular service 17 offering. 18 Q. Exhibit A to, I believe it would be the 19 petition, is a listing of areas. Now, that document is 20 entitled Exchange Areas in which GCC License 21 Corporation is seeking designation as an ETC. Are 22 there any exchange areas listed on that Exhibit A 23 attachment? What's listed on that attachment? 24 A. Counties. 25 Q. Is GCC asking for ETC designation on an</p>
<p style="text-align: right;">Page 38</p> <p>1 A. It's a further notice of proposed rule 2 making. 3 COMMISSIONER SCHOENFELDER: Thank you. Much 4 difference. 5 A. I would say that the FCC has asked some 6 questions with respect to local usage and how that 7 would impact a universal service offering of a wire 8 line and wireless carrier, but they do -- at the same 9 time, you know, wireless carriers are the ones that are 10 offering for the most part measured service. So you 11 know the issue probably applies more directly to a 12 wireless carrier's offering than a wire line carrier's 13 offering. So they tie up a number of questions that 14 specifically related to a wireless carrier. 15 Q. But that specific paragraph really talks of 16 local usage requirement with respect to wireless 17 customers, does it not? 18 A. There are two sentences here that 19 specifically reference wireless. The other, I guess, 20 three sentences are more generic. 21 Q. Wireless service today requires the wireless 22 subscriber to pay for both outgoing and incoming calls 23 on the wireless service; isn't that correct? 24 A. That's correct, for the most part. I think 25 there's some offerings that have, you know, the first</p>	<p style="text-align: right;">Page 40</p> <p>1 exchange-by-exchange basis? 2 A. Yes. And to the extent that the Commission 3 concludes that for territory served by the rural 4 telephone companies that you would lump all the 5 exchanges together into the study area and say that the 6 study area is the appropriate service area for 7 designation, then I think that would apply. What we 8 did here is as a one -- as a nonlocal telephone 9 company, we didn't know specifically all the exchanges 10 within the state, so we listed the counties within the 11 state that we hold licenses, which are all the counties 12 within the state in that we're seeking designation in 13 each exchange within the state is basically what it 14 comes down to. 15 And then for rural telephone companies, if 16 the Commission concludes that the study area is the 17 more appropriate service area, then I think what you do 18 is you just lump all the exchanges that are within that 19 study area and that would be our designated service 20 area, the study area as opposed to each individual 21 exchange. But in terms of U S West, from what I 22 understand, it would be designated on an 23 exchange-by-exchange basis. 24 Q. You state on page three of your testimony 25 that even though there is currently no state universal</p>

EXHIBIT B



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY GCC)
LICENSE CORPORATION FOR DESIGNATION)
AS AN ELIGIBLE TELECOMMUNICATIONS)
CARRIER)
FINDINGS OF FACT AND
CONCLUSIONS OF LAW;
NOTICE OF ENTRY OF
ORDER
TC98-146

MAY 21

On August 25, 1998, the South Dakota Public Utilities Commission (Commission) received a request from GCC License Corporation (GCC) requesting designation as an eligible telecommunications carrier (ETC) for all the exchanges contained within all of the counties in South Dakota.

On August 26, 1998, the Commission electronically transmitted notice of the filing and the intervention deadline of September 11, 1998, to interested individuals and entities. At its September 23, 1998, meeting, the Commission granted intervention to Dakota Telecommunications Group, Inc. (DTG), South Dakota Independent Telephone Coalition (SDITC), and U S WEST Communications, Inc. (U S WEST).

The Commission set the hearing for December 17 and 18, 1998, starting at 9:00 A.M., on December 17, 1998, in Room 412, State Capitol, Pierre, South Dakota. The issue at the hearing was whether GCC should be granted designation as an eligible telecommunications carrier for all the exchanges contained within all of the counties in South Dakota. The hearing was held as scheduled and briefs were filed following the hearing. At its April 26, 1999, meeting, the Commission unanimously voted to deny the application.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 25, 1998, GCC filed an application requesting designation as an ETC for all of the counties within South Dakota. Exhibit 1. GCC's application listed counties it was requesting for ETC status instead of exchanges because it did not know all the exchanges in the state. Tr. at 40. GCC currently provides mobile cellular service in South Dakota. Tr. at 19. GCC uses the trade name of Cellular One. Tr. at 76. GCC is a wholly-owned subsidiary of Western Wireless Corporation (Western Wireless). Tr. at 22.
2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. §

214(e)(2). GCC is requesting designation as an additional ETC throughout the state. Exhibit 3 at 10. South Dakota exchanges are served by both nonrural and rural telephone companies.

3. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.

4. The Federal Communications Commission (FCC) has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).

5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411.

6. GCC asserts that it currently provides all of the services as designated by the FCC through its existing mobile cellular services. Tr. at 123. Cellular service is generally provisioned as a mobile service. Tr. at 25.

7. Although GCC stated that its existing mobile cellular services currently provide all of the services supported by universal service, GCC intends to offer universal service initially through a fixed wireless offering. Exhibit 4 at 7. GCC specifically stated that it is not seeking universal service funding for the mobile cellular service that it currently provides. Exhibit 3 at 8.

8. GCC states that the Commission can look at the current mobile services it provides to determine whether it meets ETC requirements because GCC would use the same network infrastructure to provision its fixed wireless service. Tr. at 29. The Commission disagrees, and finds that it cannot base its decision on whether to grant ETC status to GCC based on GCC's current mobile cellular service because it is not sufficiently comparable to its proposed fixed wireless system. GCC's own statements support this finding.

9. For example, GCC stated that "[b]ecause GCC's cellular network is designed to serve mobile customers, it would be inappropriate to compare the voice quality using a handheld mobile phone with the voice quality of a fixed wireline service. This is so because GCC's cellular network has been designed to serve mobile customers that may be close to, and in direct line-of-sight of, a transmitter or several miles from, and not in line-of-sight of, a

transmitter. To optimize voice quality for its universal service customers, GCC will construct additional antenna towers, as necessary, and will install fixed wireless network equipment (antennas and transmitters) at customer locations, as it did in Nevada where the Company provides universal service to residential and business customers." Exhibit 4 at 12.

10. Further, GCC conceded that there were currently gaps in coverage but stated that the current mobile service is difficult to compare to a fixed wireless service which will have telephones with greater power plus antennas. Tr. at 99.

11. Thus, the Commission finds that since GCC's universal service offering will be initially based on a fixed wireless system the Commission must look at whether the proposed fixed wireless system meets ETC requirements, not whether the existing mobile cellular service provides all of the services supported by universal service.

12. Even if the Commission could base its decision to grant ETC status on GCC's current provisioning of mobile cellular service, the Commission would be compelled to deny GCC ETC status. First, GCC does not offer a certain amount of free local usage. See 47 C.F.R. § 54.101(a)(2). Under current cellular service the subscriber pays for both incoming and outgoing calls. Tr. at 38. Second, as stated earlier, GCC's mobile cellular service has gaps in coverage that it hoped to fix through the use of a fixed wireless system. Tr. at 99. Therefore, the Commission finds that GCC has failed to show that its current mobile cellular system is able to offer all the services that are supported by federal universal support mechanisms throughout the state.

13. GCC also stated in its prefiled testimony and at the hearing that it intended to deploy personal communications service (PCS) and local multi-point distribution service (LMDS) in South Dakota. Exhibit 4 at 3. GCC initially stated that it holds PCS licenses to serve the entire state of South Dakota. Id. Later it was learned that Western PCS BTA1 License Corporation (Western PCS) owns the radio licenses for PCS in South Dakota. Tr. at 22. Western PCS is an indirect majority-owned subsidiary of Western Wireless. Id. Western PCS has not deployed any PCS systems in South Dakota. Tr. at 27.

14. GCC initially stated that it holds LMDS licenses to serve the entire state of South Dakota. Exhibit 4 at 3. Later it was learned that Eclipse Communications Corporation (Eclipse) owns the radio licenses in South Dakota for LMDS. Tr. at 22. Eclipse is a wholly-owned subsidiary of Western Wireless. Id. In addition, at the hearing, a question was raised as to whether Eclipse had, in fact, received licenses for all of the BTAs in South Dakota. Tr. at 25. Eclipse is in the initial stages of designing and implementing LMDS. Tr. at 27.

15. The Commission finds it is unclear whether GCC intended to offer universal service through PCS or LMDS. However, the Commission finds that if universal service is eventually offered through PCS or LMDS, then Western PCS BTA1 or Eclipse may be the proper companies to apply for ETC status.

16. The Commission finds that it is clear from the record that GCC will initially rely upon a fixed wireless system to offer universal service. Therefore, the Commission shall look at whether the proposed fixed wireless system meets the ETC requirements.

17. GCC does not currently provide fixed wireless loops to any customer in South Dakota. Tr. at 28. GCC has not deployed fixed wireless because there has been no customer demand for the service. Tr. at 101. GCC believed that with a universal service offering, then a customer may want a fixed unit. Id.

18. The Commission finds that since GCC is not actually offering or providing a universal service offering through a fixed wireless system, it must deny GCC's application for ETC status throughout the state. Pursuant to 47 U.S.C. § 214(e)(2), the Commission may designate an additional requesting carrier as an ETC if it "meets the requirements of paragraph (1)." Paragraph one requires an ETC to offer the supported services throughout the area and advertise the availability of such services. GCC is not offering fixed wireless service nor is it advertising the availability of a fixed wireless service throughout South Dakota. Although GCC argues that there is no requirement that a requesting carrier actually offer the services at the time of its application, the plain language of the statute reads otherwise.

19. Moreover, GCC's application clearly demonstrates the reasons why a requesting carrier must actually be offering the supported services before applying for ETC status. The record shows that since GCC is not currently providing services through fixed wireless, it is impossible to determine whether GCC will meet ETC requirements when it actually begins to provide a universal service offering through a fixed wireless system.

20. First, it is unclear whether all customers in the state would be able to use a fixed wireless system if the Commission had granted ETC status to GCC. GCC has applied for ETC status in 13 states and asserted that it would be able to implement universal service immediately if it were designated an ETC. Tr. at 65. However, GCC's current network infrastructure does not serve the entire state. Tr. at 31, 80-81; Exhibit 9. GCC admitted that it could not provide service to every location in South Dakota. Tr. at 99. GCC would have to make changes and improvements to its network infrastructure in order to improve its voice quality for fixed wireless customers. Exhibit 4 at 12. It would need to construct additional cell sites as well as install high gain antennas and network equipment at customer locations. Exhibit 4 at 7-8; Tr. at 109-110. The antennas would either be a small antenna attached to a fixed unit or a permanent antenna on the roof. Tr. at 92.

21. As an example of a fixed wireless offering, GCC noted the provisioning of fixed wireless service in Reese River Valley and Antelope Valley in Nevada and in North Dakota. Exhibit 4 at 8; Tr. at 100. In both of those cases, GCC had to put in extra cell sites to improve its fixed wireless service. Tr. at 99-100. In Nevada, GCC had to construct another cell site in order to give customers improved service because the original fixed wireless system had problems with blocking. Id.

22. Even if the Commission could grant a company ETC status based on intentions to serve, the Commission finds that GCC has failed to show that its proposed fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status.

23. Second, GCC has not yet finalized what universal service offering it plans to offer to consumers. Exhibit 4 at 13. This lack of a definite plan creates questions as to its ability to offer universal service based on fixed wireless technology throughout the entire state. For example, GCC first stated that it had not set a rate for its universal service offering because GCC would first need to know what forms of subsidies it would receive. Tr. at 33-34, 89, 114. GCC's position was that it was difficult to know whether GCC would price service at \$15.00 a month when it does not know whether it will have access to the same subsidies that are currently received by the incumbent local exchange companies. Tr. at 89. GCC referenced its offering of fixed wireless service in Reese River Valley and Antelope Valley, Nevada where it provided unlimited local usage for a flat monthly rate and stated that in Nevada the subsidies were known so GCC could provide service at that rate because it knew its costs would be covered. Tr. at 34-35. In addition, GCC would need to construct additional cell sites at an average cost of \$200,000 per site. Tr. at 109, 133. GCC stated that it would pay for any necessary antennas. Tr. at 102. GCC asserted that it would provide customer premise equipment and that all of these expenses would be factored into the cost of providing the service. Tr. at 109, 110. The units that are attached to the houses cost approximately \$300 to \$400 per unit. Tr. at 72. However, at the same hearing, GCC also stated it would provide service at a price comparable to that charged by the incumbent local exchange company. Tr. at 95.

24. The Commission finds that GCC's statements on pricing demonstrate the lack of a clear, financial plan to provision fixed wireless service throughout the state. If GCC needs to know what subsidies it may receive before pricing its service to ensure that its costs will be covered, then the Commission does not understand how it can also say that the price of that service will be comparable with that charged by the incumbent local exchange company. GCC did not show to the Commission that it had a viable financial plan to provide fixed wireless service throughout South Dakota.

25. Moreover, GCC's references to its provisioning of fixed wireless service in Reese River Valley and Antelope Valley, Nevada, only strengthens the Commission's concerns as to the viability of GCC's being able to offer a fixed wireless service throughout South Dakota. In Reese River Valley and Antelope Valley, Nevada, customers paid \$13.50 for fixed wireless service. Exhibit 10 at 7. However, this service was highly subsidized. Nevada Bell was billed by GCC for cellular charges that exceeded the flat local rate. *Id.* at 13-14. GCC charged Nevada Bell 37 cents a minute during the day and 25 cents a minute at night for each minute that exceeded the flat monthly rate. *Id.* at 14; Tr. at 70. Nevada Bell also paid for summary billing reports which were estimated to cost approximately \$14,000. Exhibit 10 at 13; Tr. at 69. GCC was also authorized to bill Nevada Bell for non-recurring charges. Exhibit 10 at 15.

26. The Commission finds that if GCC were actually providing a universal service offering throughout the state by the use of a fixed wireless system, then the Commission would know whether there were problems with the provisioning of the service, whether GCC was offering all of the supported services, and whether it was able to offer service to customers throughout the state of South Dakota.

27. Since the Commission finds that GCC is not currently offering the necessary services to support the granting of ETC designation, the Commission need not reach the issue of whether granting ETC status to GCC in areas served by rural telephone companies is in the public interest.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7, 49-31-7.1, 49-31-11, and 49-31-78, and 47 U.S.C. § 214(e)(1) through (5).

2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. § 214(e)(2).

3. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.

4. The FCC has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).

5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411.

6. The Commission finds that pursuant to 47 U.S.C. § 214(e), an ETC must be actually offering or providing the services supported by the federal universal service support mechanisms throughout the service area before being designated as an ETC. GCC intends to provide a universal service offering initially through a fixed wireless system. However, it does not currently offer fixed wireless service to South Dakota customers. The Commission cannot grant a company ETC status based on intentions to serve.

7. The Commission finds that since it finds that GCC is not currently offering the necessary services to support the granting of ETC designation, it need not reach the issue of whether granting ETC status to GCC in areas served by rural customers is in the public interest.

It is therefore

ORDERED, that GCC's application requesting designation as an ETC for all of the exchanges contained within all of the counties in South Dakota is denied.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 19th day of May, 1999. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 19th day of May, 1999.

<p align="center">CERTIFICATE OF SERVICE</p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.</p> <p>By: <u>Alaine Kels</u></p> <p>Date: <u>5/19/99</u></p> <p align="center">(OFFICIAL SEAL)</p>

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

EXHIBIT C

672 551 4000

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF GCC LICENSE
CORPORATION FOR CERTIFICATION AS
AN ELIGIBLE TELECOMMUNICATIONS
CARRIER PURSUANT TO THE
TELECOMMUNICATIONS ACT OF 1996

) CAUSE NO. NO.
) 980000470
)
)
)

FILED
MAY 13 1998

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

TRANSCRIPT OF PROCEEDINGS

ORAL RULING OF THE ALJ

MAY 13, 1998

OFFICIAL REPORTER:

LYNETTE R. WRANTY, C.S.R.

OKLAHOMA CORPORATION COMMISSION — OFFICIAL TRANSCRIPT

1 1W-2

2 APPEARANCES

3 No appearances were taken.
4
5
6
7
8
9

10 STATEMENT OF CAUSE

11 This Cause PUD 980000470 came on for hearing on the
12 13th day of May, 1999, before Robert Goldfield,
13 Administrative Law Judge for the Corporation Commission of
14 the State of Oklahoma, for the purpose of hearing giving an
15 oral ruling on the merits and reporting thereon to the
16 Commission.
17

18 The cause was called for hearing and the following
19 proceedings were had:
20
21
22
23
24
25

OFFICIAL REPORTER:

LYNETTE E. WEANY, C.S.R.

OKLAHOMA CORPORATION COMMISSION - OFFICIAL TRANSCRIPT

1 lw-3

2 P R O C E E D I N G S

3 THE COURT: Okay. GCC application. Open the
4 record please in PUD 98-470.

5 I am recommending the application of GCC
6 License Corporation be denied. This Applicant doesn't meet
7 any of the prerequisites necessary to be considered to be
8 designated as an eligible telecommunications carrier for
9 purposes of obtaining universal service support.

10 The application and testimony are replete
11 with statements of "we will" or "we may in the future"
12 follow some unknown criteria that the applicant failed to
13 divulge in this case. The Applicant's plan, or lack
14 thereof, put so little forward for consideration that not
15 only does the Applicant fail to rise to the level necessary
16 for consideration for designation as an ETC in the rural
17 exchanges, but the Applicant doesn't even rise to the level
18 necessary for consideration in the Southwestern Bell
19 Telephone exchanges.

20 GCC does not now provide the services that
21 are necessary as a part of the universal service package and
22 cannot even determine if it will offer all of the services
23 that are considered a part of a universal service package.

24 And, obviously, GCC does not advertise that
25 which it doesn't provide or will provide. In fact, GCC
readily admits that it cannot determine the pricing of the

1 1b-4
2 service at this time, which is a primary element of public
3 interest.

4 Further, it is not in the public interest to
5 grant GCC's application when it refuses to accept any of the
6 burdens associated with the ETC designation, such as OCC
7 oversight of quality of service, pricing and consumer
8 complaints and its carrier of last resort obligations.

9 And, finally, I find no evidence presented
10 where the public would benefit from the granting of this
11 application.

12 I'm going to ask that a written report be
13 prepared. I'm going to ask Staff to prepare the procedural
14 history, please. I'm going to ask Mr. Comingdeer's office
15 if you will prepare the findings and recommendations. And
16 each individual party, prepare your summary of your
17 testimony that was presented at the hearing and forward that
18 to Mr. Comingdeer to put in a final draft.

19 And then, Mr. Comingdeer, if you will see
20 that it is circulated, and if everybody agrees to the
21 report, then fine. If not, if there is disagreement, give
22 it either in caps or underline it, the way we do them, and I
23 will make the final decision and language that will go in
24 when the report goes out. Okay?

25 We will close the record on that matter.
Thank you.

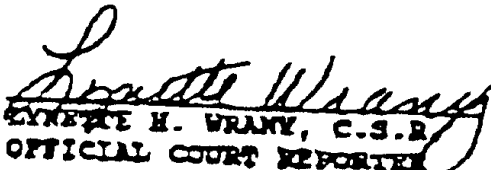
1 1W-5
2 COUNTY OF OKLAHOMA)
3 STATE OF OKLAHOMA) SS.
4
5
6
7

8 REPORTER'S CERTIFICATE

9 I, LYNETTE H. WRANY, Official Court Reporter within and
10 for the Corporation Commission of the State of Oklahoma, do
11 hereby certify that the above and foregoing is a true and
12 complete transcript of the record made before the
13 Corporation Commission of the State of Oklahoma in Cause
14 Number PUD 980000470, heard on the 13th day of May, 1999.

15 IN WITNESS WHEREOF, I have hereunto set my hand and
16 seal as such Official Court Reporter on this, the 13th day
17 of May, 1999.
18
19
20
21
22

23 y/c Wrany
24 Oklahoma : Shorthand Reporter
25 C.E. J. 01167
26 Exp. Date October 31, 2000


LYNETTE H. WRANY, C.S.R.
OFFICIAL COURT REPORTER
OKLAHOMA CORPORATION COMMISSION

OKLAHOMA CORPORATION COMMISSION - OFFICIAL TRANSCRIPT

EXHIBIT D

BOB MILLER
Governor

STATE OF NEVADA
PUBLIC UTILITIES COMMISSION OF NEVADA

1150 E. William Street
Carson City, Nevada 89701-3109
Policy (702) 687-6007 • Fax (702) 687-6110
Staff (702) 687-6001 • Fax (702) 687-6120

RURAL NEVADA
557 W. Silver Street, No. 207
Elko, Nevada 89801
(702) 738-4914 • Fax (702) 778-6928



SOUTHERN NEVADA OFFICE
556 E. Washington Avenue, No. 4500
Las Vegas, Nevada 89101
(702) 486-2600 • Fax (702) 486-2595

September 23, 1998

Gene DeJordy, Esq.
Executive Director - Regulatory Affairs
Western Wireless Corporation
GCC License Corporation
3650 131st Avenue SE, #400
Bellevue, WA 98006

Re: The Petition of GCC License Corporation For Designation As An Eligible
Telecommunications Carrier

Dear Mr. DeJordy:

Enclosed is the Petition of GCC License Corporation ("Petitioner") For Designation As An Eligible Telecommunications Carrier ("Petition"), which the Public Utilities Commission of Nevada ("Commission") received for filing on September 1, 1998. As discussed below, the Petitioner cannot be designated an Eligible Telecommunications Carrier ("ETC") at this time for either federal or state purposes. Therefore, the Petition must be rejected and returned.

For federal eligibility purposes, a common carrier must meet the requirements of 47 C.F.R. § 54.201(d). Among these requirements is the provision that a common carrier "shall throughout the service area for which the designation is received, [o]ffer the services ('services') that are supported by federal universal support mechanisms" The Petitioner is unable to make its *prima facie* case for eligibility as an ETC because it does not assert that it will offer the services throughout its service area. Instead, the Petitioner states that "Western Wireless will make available the 'universal services' provided pursuant to its ETC designation to all consumers in the exchange area for which it seeks designation, provided that it offers such services in the exchange area." This is procedurally insufficient. The Petitioner must resell the services of others, if necessary, in order to offer the services throughout its service area. The regulations presuppose this situation by allowing services to be provided by a common carrier "using . . . a combination of its own facilities and resale of another carrier's services." See 47

COLLEEN BRYANT

Carson City/Reno—(702) 687-6000

Las Vegas—(702) 486-2600

C.F.R. § 54.201(d)(1). Until the Petitioner rectifies this shortcoming, its application to be designated an ETC for federal purposes cannot be considered further.

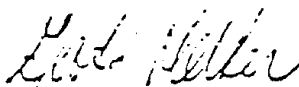
For state eligibility purposes, the analysis shares elements in common with the federal regulatory framework. Similar to the federal requirement previously discussed, services must be offered throughout the service area for which the provider seeks designation as an ETC. Adopted Regulation R150-97, § 16(b). Additionally, the Petitioner does not hold a Certificate of Public Convenience and Necessity issued by the Nevada Public Utilities Commission that authorizes the provider of telecommunications to provide basic service. Regulation R150-97, § 16(a). The Petitioner does not meet either of the elements discussed in this paragraph, failing to make its *prima facie* case for eligibility as an ETC for state purposes.

Assuming a future petition is filed meeting the requirement that services be provided throughout the service area, the Commission will then be able to consider an ETC designation for federal purposes. If the Petitioner wishes to pursue designation as an ETC for state eligibility purposes, it may wish to file a separate petition for a rulemaking with the Commission proposing to eliminate the Certificate of Public Convenience and Necessity requirement.

The Commission will retain the \$50.00 filing fee, Receipt No. 25147, for resubmission of the Petition. If you do not resubmit the filing, please file a request with the Commission Secretary, Jeanne Reynolds, in order to obtain a refund of the fee.

If you have any questions regarding the foregoing, please do not hesitate to contact me at (702) 687-6085 or the Commission's Regulatory Policy and Market Analysis Division at (702) 687-6005.

Sincerely,



Geoff Helfer
Legal Case Manager

cc: Case Management
General Counsel

BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

In the Matter of)

GCC License Corporation)

Petition for Designation as an Eligible)

Telecommunications Carrier)

DOCKET NO. _____

PUBLIC UTILITIES COMMISSION
DOCKET No. 93-001
PAR WWM GLL

GCC LICENSE CORPORATION
PETITION FOR DESIGNATION AS
AN ELIGIBLE TELECOMMUNICATIONS CARRIER

GCC License Corporation ("Western Wireless"),¹ doing business in Nevada as Cellular One, pursuant to Section 214(e)(2) of the federal Communications Act of 1934, as amended ("Act"),² hereby petitions Nevada Public Service Commission (the "Commission") for an order designating it as an Eligible Telecommunications Carrier ("ETC") in those exchange areas specified herein. As an ETC, Western Wireless will seek support from the federal universal service fund and, to the extent available, the state universal service fund for the provisioning of the services supported by these universal service funds. For all of the reasons identified below, designating Western Wireless as an ETC is consistent with applicable laws and regulations and is in the public interest.

¹ GCC License Corporation is a wholly-owned subsidiary of Western Wireless Corporation.

² 47 U.S.C. § 214(e)(2).

I. INTRODUCTION.

Western Wireless is a telecommunications carrier as defined by Section 3(49) of the Act. 47 U.S.C. Section 153(49). In the state of Nevada, Western Wireless provides cellular service in the following counties: Carson City; Churchill; Douglas; Elko; Esmeralda; Eureka; Humboldt; Lander; Lincoln; Lyon; Mineral; Nye; Pershing; Storey; and White Pine. In addition to Western Wireless' cellular service offerings in the state, companies affiliated with Western Wireless provide or are authorized to provide Personal Communications Service ("PCS") under the VoiceStream brand name and competitive local and long distance services.

The Commission's power to designate entities like Western Wireless as an ETC derives from Sections 214(e) and 254 of the Act. Section 214(e)(2) requires state commissions to designate as an ETC any common carrier that, throughout the service area for which designation of ETC status is sought, (i) offers services that are supported by Federal universal service support mechanisms and (ii) advertises the availability of such services.

In its *Universal Service Order* implementing Sections 214(e) and 254, the Federal Communications Commission ("FCC") identified the specific services that a carrier must provide to be designated as an ETC and receive universal service support.³ These services include the following:⁴

³ *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8809-25 (1997) ("*Universal Service Order*"); see also 47 C.F.R. § 54.101(a). In the *Universal Service Order*, the FCC also recognized that wireless telecommunications providers could be designated as ETCs. *Universal Service Order*, 12 FCC Rcd at

- single-party service;
- voice-grade access to the public switched telephone network ("PSTN");
- dual tone multi-frequency signaling or its functional equivalent;
- access to operator services;
- access to emergency services;
- access to interexchange services; and
- access to directory assistance.

Western Wireless currently advertises its services through several different media, and will, likewise, advertise the availability of the "universal services" in its designated service area.

II. DESIGNATION OF SERVICE AREA.

Section 214(e)(2) of the Act provides that ETC designations shall be made for a "service area" determined by the Commission. Section 214(e)(5) of the Act further provides that the "service area" shall be a geographic area established by the Commission. Given that the Commission has not generally defined the service areas required to be served by ETCs, and pending the definition of such service areas, Western Wireless seeks herein designation as an ETC in the exchange areas located in the counties identified in Attachment A. Western Wireless reserves the right to revise its service area designation once the Commission establishes rules defining ETC service areas. Western Wireless will make available the "universal services" provided pursuant to its ETC designation to

all consumers in the exchange area in which it seeks designation, provided that it offers such services in the exchange area.

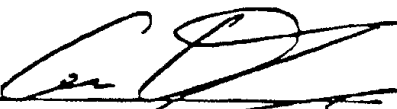
III. PUBLIC INTEREST WILL BE SERVED BY DESIGNATING WESTERN WIRELESS AS AN ETC.

Section 214(e) of the Act provides that state commissions may designate more than one ETC in geographic areas served by rural telephone companies ("RTCs") if such designation is in the public interest. Grant of this Petition would substantially advance the public interest in RTC service areas by making available to consumers: (1) telecommunications services previously not available; (2) a wide range of service options; (3) expanded local calling areas; (4) mobility; (5) high reliability and quality of service; and (6) competitive pricing.

IV. CONCLUSION.

For the reasons discussed above, the Commission should grant this Petition For Designation As An Eligible Telecommunication Carrier. The public interest would clearly be served by designating Western Wireless as an ETC and making available to consumers a competitive alternative for their telecommunications needs.

Respectfully submitted,

By: 

Gene DeJordy, Esq.
Executive Director of Regulatory Affairs
Western Wireless Corporation
3650 131st Ave., S.E., Suite 400
Bellevue, WA 98006
425-586-8055 - tel
425-586-8090 - fax
E-Mail: gene.dejordy@wwireless.com

Dated: August 28, 1998

ATTACHMENT A

EXCHANGE AREAS IN WHICH WESTERN WIRELESS IS
SEEKING DESIGNATION AS AN ETC

All Local Telephone Company Exchanges in the Following Counties:

Carson City
Churchill
Douglas
Elko
Esmeralda
Eureka
Humboldt
Lander
Lincoln
Lyon
Mineral
Nye
Pershing
Storey
White Pine

EXHIBIT E

307 MILLER
TOLSON

STATE OF NEVADA
PUBLIC UTILITIES COMMISSION OF NEVADA

727 Fairview Drive
Carson City, Nevada 89701-5451
Policy (702) 687-6007 • Fax (702) 687-6110
Staff (702) 687-6001 • Fax (702) 687-6120

RURAL NEVADA
357 W. Silver Street, No. 207
Elko, Nevada 89801
(702) 738-4914 • Fax (702) 778-6528



SOUTHERN NEVADA OFFICE
555 E. Washington Avenue, No. 4500
Las Vegas, Nevada 89101
(702) 486-2600 • Fax (702) 486-2585

December 15, 1998

Gene DeJordy, Esq.
Executive Director - Regulatory Affairs
★ Western Wireless Corporation
GCC License Corporation
3650 131st Avenue SE, #400
Bellevue, WA 98006

Re: Application of GCC License Corporation for Designation as an Eligible
Telecommunications Carrier

Dear Mr. DeJordy:

Enclosed is the Application of GCC License Corporation ("Applicant") for Designation as an Eligible Telecommunications Carrier ("Application"), which the Public Utilities Commission of Nevada ("Commission") received for filing on December 1, 1998. The Regulatory Operations Staff of the Commission ("Staff") states that this filing contains no material additional information than filed previously on September 1, 1998 and subsequently rejected. Therefore, this filing must also be rejected.

Staff believes that the Applicant should file this in a two-step process. First, the Applicant needs to file a petition to create a service area. Second, the Applicant should simultaneously file an application for designation as an Eligible Telecommunications Carrier and establish that it can provide all the required services throughout the service area. Please note there are different standards for establishing rural and non-rural service areas.

Before proceeding with this matter, I would recommend that the Applicant contact either Larry Blank, Manager of Regulatory Policy, at (775) 687-6052; or Sharon Thomas, Director of Regulatory Operations, at (775) 687-6011 in order to discuss the proper procedures for this particular type of filing.

EXHIBIT

BMW 3

Carson City/Heno—(702) 687-6000

Las Vegas—(702) 486-2600

Other Areas—800-952-0900, Ext. 87-6000

DEC-15-1998 15:39

722 687 6110

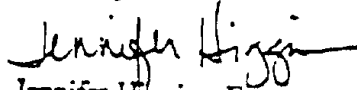
95X

P.22

The Commission will retain the \$200.00 filing fee, Receipt Nos. 25147 and 25349, for the filing to be resubmitted. If you do not resubmit the filing, please file a request with the Commission Secretary, Jeanne Reynolds, in order to obtain a refund of the fee.

If you have any questions regarding the foregoing, please do not hesitate to contact me at (775) 687-6085.

Sincerely,



Jennifer Higgins, Esq.
Legal Case Manager

cc: Case Management
Manager Regulatory Policy
Director Regulatory Operations

EXHIBIT F



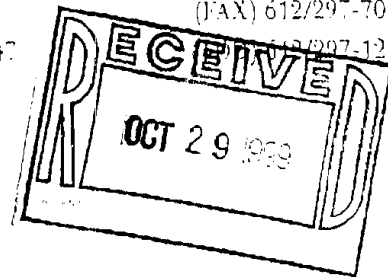
STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

121 7th Place East ■ Suite 350 ■ St. Paul, Minnesota 55101-2147

612/296-7124

(FAX) 612/297-7073

612/297-1200



October 27, 1999

To: All Parties on the Service List and All Interested Parties
Docket No. P5695/M-98-1285

From: Burl W. Haar
Executive Secretary

A handwritten signature in dark ink, appearing to read "Burl W. Haar".

Subject: **Schedule of Further Filings and Comments**

BACKGROUND

On October 27, 1999, the Minnesota Public Commission issued its ORDER GRANTING PRELIMINARY APPROVAL AND REQUIRING FURTHER FILINGS in Docket No. P5695/M-98-1285, In the Matter of Minnesota Cellular's Petition for Designation as an Eligible Telecommunications Carrier. The Commission deferred final approval of MCC's ETC application contingent upon the Commission's review and approval of compliance filings, including a tariff filing with a detailed description of MCC's universal service package offering with at least one package with unlimited local usage and a price that does not exceed 110 percent of the incumbents' rates, an advertising plan, and a proposed customer service agreement that compares MCC's service quality with the existing Commission service quality standards.

SCHEDULE OF THE COMPLIANCE FILINGS AND PARTIES' COMMENTS

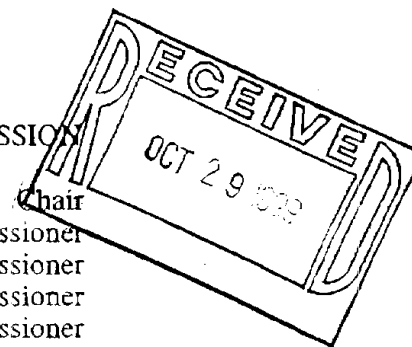
MCC is hereby directed to file tariffs and specified compliance filings no later than December 27, 1999 and to provide copies of the filings to all parties to this proceeding. Parties wishing to provide comments regarding the compliance filings should submit them to the Commission's Executive Secretary by January 26, 2000. MCC's reply comments is due on February 7, 2000.

Questions regarding this matter may be directed to Lillian Brion at 651-297-7864.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayner
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner



In the Matter of Minnesota Cellular
Corporation's Petition for Designation as an
Eligible Telecommunications Carrier

ISSUE DATE: October 27, 1999

DOCKET NO. P-5695/M-98-1285

ORDER GRANTING PRELIMINARY
APPROVAL AND REQUIRING FURTHER
FILINGS

PROCEDURAL HISTORY

On September 1, 1998 Minnesota Cellular Corporation filed a petition under the federal Telecommunications Act of 1996¹ asking this Commission to designate it an "eligible telecommunications carrier" (ETC) in 43 counties in northern Minnesota. The Company needed the designation to qualify for subsidies from the federal universal service fund.

Initially, the Company requested an ETC designation for both the state and federal universal service funds. Later, the Company asked the Commission to hold its state request in abeyance until state universal service rules were in place.

The following parties intervened in this case: the Minnesota Department of Commerce, formerly the Department of Public Service (the Department); the Residential and Small Business Utilities Division of the Office of the Attorney General (the RUD-OAG); U S WEST Communications, Inc.; the Minnesota Independent Coalition, on behalf of 21 rural telephone companies providing service in the area Minnesota Cellular seeks to serve; and Frontier Communications of Minnesota, Inc. (Frontier).

On June 2, 1999 the Commission issued an Order designating Commissioner Gregory Scott the lead Commissioner for this docket, as permitted under recently passed legislation.² The Order authorized Commissioner Scott to exercise the Commission's authority to develop the evidentiary record. Commissioner Scott held hearings on the application on June 2, 3, and 21, 1999.

The case came before the Commission for decision on September 29, 1999.

¹ Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of title 47, United States Code).

² Act of May 6, 1999, ch. 125, 1999 Minn. Sess. Law Serv. (West).

FINDINGS AND CONCLUSIONS

I. Historical Background

The federal Telecommunications Act of 1996 is designed to open the nation's telecommunications markets to competition. Its universal service provisions are designed to keep competition from driving rates in rural, insular, and high cost areas to unaffordable levels, by subsidizing them. Only carriers that have been designated eligible telecommunications carriers are eligible to receive these subsidies.

Congress realized that competition would force changes in the network of subsidies keeping rural and urban rates comparable. Traditionally, rural rates, which otherwise would have reflected the higher costs of serving rural areas, were subsidized explicitly by payments from federal high-cost funds and implicitly by requiring carriers to average rural and urban costs when setting rates.

Competition called into question the continued viability of subsidizing rural rates through averaged pricing. While no one was sure how competition would develop, many credible scenarios suggested that it would first appear in urban areas, for two reasons: (1) urban areas cost the least to serve, and (2) urban rates are often inflated by rural subsidies, which new entrants without rural customers would not need. Together, these factors made urban markets the logical starting point for new entrants seeking to underprice the incumbents.

This urban-first scenario not only threatened the incumbent carriers and the rural customers – it did not represent the healthy, robust competition the Act envisioned. Congress therefore directed the Federal Communications Commission (FCC) to work with the states through a Federal-State Joint Board to overhaul existing universal service support systems.³

The Act required the FCC to establish collection mechanisms that were equitable and nondiscriminatory and payment mechanisms that were specific, predictable, and sufficient. It required the agency to determine which services qualified for subsidies and to ensure that universal service payments were not used to subsidize other services. It authorized the states to determine which carriers qualified for universal service funding.⁴ The Act's term for these carriers was "eligible telecommunications carriers."

II. The Legal Standard

To function as an eligible telecommunications carrier a common carrier must offer and advertise throughout its designated service area the services the FCC has decided to support with universal service funding. It must provide these services using at least some of its own facilities.⁵

³ 47 U.S.C. § 254.

⁴ 47 U.S.C. § 214 (e).

⁵ 47 U.S.C. § 214 (e).

The list of services eligible for universal service support will change over time. The Act states that "[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."⁶ The current list of services is as follows:⁷

- voice grade access to the public switched network;
- local usage;
- touch-tone service or its functional equivalent;
- single-party service;
- access to emergency services, including 911 and enhanced 911;
- access to operator services;
- access to interexchange services;
- access to directory assistance;
- toll limitation for qualifying low-income customers.

Responsibility for designating eligible telecommunications carriers rests with the state commissions, except in cases in which they lack jurisdiction over the applicant.⁸ State commissions must apply the criteria of the Act, the criteria set by the FCC, and any applicable state criteria. (The FCC's original universal service rules barred state commissions from applying any additional state criteria, but that portion of the rules has been invalidated by the United States Court of Appeals for the Fifth Circuit.⁹)

The states are required to designate all qualified applicants, except in areas served by rural telephone companies. For these areas the state commission must first make a finding that designating more than one carrier is in the public interest.¹⁰ This requirement reflects Congressional concern that some thinly populated areas might not be able to support more than one carrier.

III. Minnesota Cellular's Application

Minnesota Cellular is a mobile wireless provider licensed by the Federal Communications Commission to provide service in 43 counties in northern Minnesota. The Company requested eligible telecommunications carrier (ETC) status for this entire area and stated that it intended to offer a new service, fixed wireless service, as its universal service offering.

⁶ 47 U.S.C. § 254 (c) (1).

⁷ 47 C.F.R. § 54.101 (a).

⁸ 47 U.S.C. § 214 (e) (6).

⁹ Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. July 30, 1999).

¹⁰ 47 U.S.C. § 214 (e) (2).

The new offering would include all services required by the FCC. It would be priced within 10% of the rates charged by the incumbents. It would include, as standard features, enhancements not available from the incumbents, such as an expanded local calling area and limited service mobility. It would also include, as standard features, some enhancements for which the incumbents charge a premium, such as Caller ID and voice mail.

Minnesota Cellular's proposed service area included territory served by U S WEST, GTE Minnesota, Sprint Minnesota, Frontier Communications of Minnesota, Inc., and 37 small carriers that the Company acknowledged to be rural telephone companies. Frontier also claimed to be a rural telephone company, but Minnesota Cellular disputed that claim.

The 37 carriers that all parties agree are rural telephone companies are as follows:

- Barnesville Telephone Company
- Blackduck Telephone Company
- Blue Earth Valley Telephone Company
- Clara City Telephone Exchange Company
- Clements Telephone Company, Inc.
- Dunnell Telephone Company, Inc.
- Farmers Mutual Telephone Company
- Federated Telecom, Inc.
- Felton Telephone Company, Inc.
- Garden Valley Telephone Company
- Granada Telephone Company
- Halstad Telephone Company
- Hills Telephone Company
- Hutchinson Telephone Company
- Interstate Telecommunications Cooperative, Inc.
- Lakedale Telephone Company
- Lismore Cooperative Telephone Company
- Mankato Citizens Telephone Company
- Melrose Telephone Company
- Mid-Communications, Inc.
- Mid-State Telephone Company
- Minnesota Valley Telephone Company
- New Ulm Telecom, Inc.
- Paul Bunyan Rural Telephone Company
- Polar Rural Telephone Company
- Red River Rural Telephone Company
- Redwood County Telephone Company
- Sacred Heart Telephone Company
- Sioux Valley Telephone Company
- Sleepy Eye Telephone Company
- Splitrock Telecom Cooperative, Inc.
- Twin Valley-Ulen Telephone Company
- Western Telephone Company
- Wikstrom Telephone Company
- Winsted Telephone Company
- Winthrop Telephone Company
- Woodstock Telephone Company

IV. Issues Summary

Not only is this Minnesota's first ETC application by a non-incumbent carrier seeking universal service funds, it is the first ETC application by a wireless carrier. It therefore raises several issues of first impression. (The Commission *has* acted on two other ETC dockets - one granted ETC status to all Minnesota incumbent local exchange carriers; the other granted conditional ETC status to a competitive local exchange carrier that later withdrew its application. Neither case offers extensive guidance here.)

The issues in this case fall into four major categories.

A. Challenges to the Application

The first category of issues involves challenges to the application itself. U S WEST, the RUD-OAG, the Minnesota Independent Coalition (MIC), and Frontier all claimed that Minnesota Cellular failed the statutory test for ETC designation, for one or more of the following reasons:

- (1) the Company does not currently offer and advertise throughout its service area a service package meeting universal service requirements;
- (2) the Company has not described its proposed universal service offering in enough detail or with enough credibility to prove that it meets universal service requirements;
- (3) the Company claims that the Commission has no authority over the pricing or quality of its universal service offering, jeopardizing the Commission's ability to protect the public interest and compelling it to deny the application.

B. Rural Telephone Company Public Interest Test

The second cluster of issues relates to whether it is in the public interest to designate a second ETC in the areas within Minnesota Cellular's service area that are served by rural telephone companies. MIC, RUD-OAG, Frontier, and U S WEST contend that designating a second ETC in these areas is contrary to the public interest. The Department of Commerce (the Department) and Minnesota Cellular contend that designating a second ETC is consistent with the public interest.

C. Frontier's Rural Telephone Company Claim

The third cluster of issues has to do with whether Frontier is a rural telephone company under the federal Telecommunications Act of 1996 (the Act). If it is, the Commission cannot designate Minnesota Cellular an ETC in Frontier's service area without first making a finding that it is in the public interest to have more than one ETC in that area.

In this case, however, there would be no need to reach the public interest issue, since Minnesota Cellular has stated that it will withdraw its application as to Frontier's service area if Frontier is found to be a rural telephone company. (One of the special protections the Act grants rural telephone companies is to require ETCs to serve their entire study areas; Minnesota Cellular is not prepared to serve Frontier's entire study area.)

The Department opposed Frontier's claim to be a rural telephone company; the other parties took no position on the issue.

D. Commission Authority Over Minnesota Cellular's Universal Service Offering

The fourth cluster of issues revolves around the Commission's authority to impose conditions on Minnesota Cellular's universal service offering, both initially and on an ongoing basis. Minnesota Cellular contends that the Commission has no authority, initial or ongoing, over the affordability, terms and conditions, or quality of its universal service offering. The other parties contend that the Commission does have initial and ongoing authority, from a variety of sources.

V. Summary of Commission Action

The Commission will grant preliminary approval of Minnesota Cellular's application for ETC status throughout the service area for which it has applied. Final approval will not be granted until the Commission has reviewed and approved a tariff filing detailing the content, pricing, and terms and conditions of the Company's universal service offering.

The Commission finds that it is in the public interest to designate Minnesota Cellular an ETC in the portions of its service area that are served by rural telephone companies, assuming that its universal service tariff passes muster. The Commission rejects Frontier's claim that it is a rural telephone company.

The Commission finds that it does have initial and ongoing authority over Minnesota Cellular's universal service offering. The Commission will exercise that authority to protect the Minnesota public.

These decisions are explained below, using the issues framework developed previously.

VI. Preliminary Finding that the Company's Application Meets ETC Requirements

Parties have raised three major challenges to Minnesota Cellular's application, in addition to claiming that it fails the special public interest test applicable to areas served by rural telephone companies. Those challenges can be summarized as follows:

- (1) To be designated an ETC, a carrier must be offering a service package qualifying for universal service funding at the time of application. Minnesota Cellular fails this test.
- (2) Even if intent to offer a qualifying universal service package were adequate, the Company's universal service proposal is not specific or credible enough to demonstrate that it can provide affordable, high-quality service throughout its proposed service area.
- (3) The Company's denial of the Commission's authority over the affordability, quality, and terms and conditions of its universal service offering jeopardizes the Commission's ability to protect the public interest and compels it to deny the application.

Each challenge will be addressed in turn.

A. The Application Does Not Fail for Lack of a Current Universal Service Package

Several parties claim that the Act requires an applicant to be actually offering a universal service package including the nine FCC-required services throughout its proposed service area at the time of application. The Commission disagrees.

As the Department pointed out, the federal Act appears to treat ETC designation as a linear process:

A common carrier *designated* as an eligible telecommunications carrier under paragraph (2), (3), or (6) *shall* be eligible to receive universal service support in accordance with section 254 of this title and *shall*, throughout the service area for which the designation is received –

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

47 U.S.C. § 214 (e) (1), emphasis added.

The plain meaning of this language is that once a carrier has been designated an ETC, it shall offer and shall advertise the supported services. The designation comes first; the obligation to offer and advertise the supported services follows.

Similarly, the FCC Order adopting its universal service rules makes the same assumption:

[A] carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support. . . ."

In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997), emphasis in original.

Not only does viewing ETC designation as a linear process square with the plain meaning of the statute, it squares with the underlying policy of opening the nation's telecommunications markets to competition. Requiring ETC applicants to actually offer and advertise universal service packages throughout their service areas before designating them ETCs would be inherently anti-competitive.

It would mean requiring them to serve without providing the subsidies that make that service possible. It would, for all practical purposes, give incumbents a lock on serving high-cost areas, and on the subsidies they carry. This was clearly not the intent of Congress, and the Commission rejects the claim that ETC applicants must be actually providing the precise service(s) for which they seek universal service subsidies at the time of application.

B. The Application Does Not Fail for Lack of Specificity or Credibility

All parties but the Department also claimed that Minnesota Cellular's proposed universal service offering was too indefinite, its technology too untested, or its track record too sparse, to credibly demonstrate its ability to provide high-quality, affordable service throughout its service area. The Commission disagrees.

1. The Company Already Provides Eight of the Nine Required Services and Has No Customers for the Ninth

First, of the nine FCC-mandated services an ETC must provide, Minnesota Cellular already provides eight. (It has no customers eligible for the ninth.) This is a definite and credible indication of its ability to provide the FCC-required services. Those services are as follows:

- (1) voice grade access to the public switched network;
- (2) local usage;
- (3) touch-tone service or its functional equivalent;
- (4) single-party service;
- (5) access to emergency services, including 911 and enhanced 911;
- (6) access to operator services;
- (7) access to interexchange services;
- (8) access to directory assistance;
- (9) toll limitation for qualifying low-income customers.

No one disputes that Minnesota Cellular provides touch-tone-equivalent service, single-party service, access to operator services, access to interexchange services, and access to directory assistance. No one disputes that it currently provides voice grade access to the public network, although U S WEST questions whether it can consistently provide voice grade access throughout its service area. (This issue is treated below as a service quality issue.)

Similarly, no one disputes that the Company complies with state law and FCC directives on providing access to emergency services. All Minnesota Cellular customers have access to 911, and the Company is following established procedures for offering enhanced 911 service where available.

No one disputes that Minnesota Cellular currently provides some local usage in all of its service packages. It is unclear at present whether universal service offerings must include unlimited local usage or whether they may include metered usage beyond some unspecified minimum. In any case, the Company has stated that it will offer at least one universal service package with unlimited usage, at least until the FCC completes an ongoing rulemaking that will specify local usage requirements.

Finally, the Company does not currently offer toll limitation to qualifying low income customers, but it currently has no qualifying low income customers. ("Qualifying low income customers" are participants in the federal Lifeline program, which Minnesota Cellular cannot join until it has been designated an ETC.) The Company testified without contradiction that it has the technical capability to offer toll limitation upon designation.

The Company's current provision of eight of the nine required services, together with its clear ability to provide the ninth and its stated willingness to meet the statute's advertising requirements, make a strong case for ETC designation, at least in the areas not served by rural telephone companies. The concerns that remain focus on parties' claims that the Company's service may prove to be unaffordable, of inferior quality, or not available throughout its service area.

2. There Is No Substantial Reason to Doubt the Company's Ability to Provide Affordable, High-quality Service Throughout its Proposed Service Area

a. Service Quality

Some parties questioned Minnesota Cellular's ability to provide high-quality service in all parts of its service area, because wireless service can be disrupted by hilly terrain or other topographic features. Similarly, some parties argued that wireless service cannot support the kinds of advanced services, especially data transmission services, that federal and state telecommunications policies encourage.

Minnesota Cellular countered by promising to do anything necessary to deliver a strong, reliable signal to all customers in its service area, including measures such as placing high-gain antennas on their homes. The technology to ensure continuous, high-quality service is available, the Company said; it is just not normally used for mobile wireless service, since any terrain-related signal disturbance will end as the customer travels. The fixed wireless equipment the Company will offer its universal service customers will have a more powerful signal from the outset, and that signal can be improved as necessary.

The Company conceded that wireless service currently provides lower data transmission speeds than most land line service, but pointed out that the FCC rejected proposals to include data transmission in the nine mandated services.¹¹ The Company also pointed out that it is uncertain today what "advanced services" will mean as technology develops; by the time the FCC requires advanced services of ETCs, those services may include services uniquely suited to wireless technology.

The Commission finds no substantial basis for questioning the Company's ability or intention to provide high-quality service. The Company has carefully considered possible obstacles to providing high-quality service, has developed strategies for overcoming them, and has pledged to remedy any service quality problems at any cost. This is adequate under any reasonable standard.

Similarly, the Commission does not believe that the slower data transmission speeds that go with wireless technology justify denying this application. One of the Commission's duties under the Act and the FCC rules is to refrain from discriminating against applicants on the basis of technology. One of the explicit goals of the FCC universal service rules is to open

¹¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997) at ¶ 64.

telecommunications markets to cable and wireless providers.¹² Given these directives, the Commission will not deny this application based on the intrinsic characteristics of wireless technology.

The Commission will, however, condition final ETC designation of Minnesota Cellular on a compliance filing demonstrating adequate service quality, using the Commission's existing service quality standards as a touchstone.

b. Affordability

Several parties claimed that Minnesota Cellular's universal service offering would in fact be loaded with premium features, targeted at high-end customers, and priced beyond the means of many, if not most, residents of its service area. They saw this as a misuse of the universal service fund.

The Commission accepts Minnesota Cellular at its word - and intends to hold it to its word - that it will offer at least one universal service package with unlimited local usage priced within 10% of the incumbents' standard rates. That is affordable by any reasonable standard. If that package contains premium features or an expanded calling area as well, that is between the company and the consumer.

The FCC has explicitly rejected the proposition that ETCs should be forced to offer at least one "stripped down" telecommunications package.¹³ That agency, like this one, apparently viewed the Act's ban on subsidizing competitive services with universal service funds¹⁴ as adequate protection against abuse, and welcomed the prospect of those funds sparking competition and innovative service offerings.

c. Service Area

It is undisputed that there are small areas within Minnesota Cellular's proposed service area that its signal does not currently reach. These areas are within the study areas of Farmers Mutual Telephone Company, Felton Telephone Company, Garden Valley Telephone Company, and Wikstrom Telephone Company. It is not clear from the record if these areas are populated, if the incumbents serve anyone there, or if there is any reason to believe anyone there will request service from Minnesota Cellular.

¹² *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997) at ¶¶ 49, 145, 146; *In the Matter of Federal-State Board on Universal Service*, CC Docket No. 96-45, Seventh Report and Order, FCC 99-119 (May 28, 1999) at ¶ 72.

¹³ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report and Order, FCC 97-157 (May 7, 1997) at ¶¶ 86, 53.

¹⁴ 47 U.S.C. § 254 (k).

What is clear from the record is that Minnesota Cellular states that it has the capability to serve any customer who materializes within those areas and that it promises to do so promptly, with the same service quality available throughout its service area. It is also clear that there are areas within the incumbents' study areas where they do not offer service and could not serve without building new facilities.

The Commission sees no reason to deny this application or to remove these four study areas from Minnesota Cellular's service area. All carriers, but especially rural carriers, have pockets within their study areas where they have no customers or facilities. If development occurs, they have to build out to the new customer or customers. Minnesota Cellular appears to have the same "build-out" capacity as the incumbents, and the potential need for build-out is no reason to deny ETC status.

C. The Application Does Not Fail for Lack of Commission Authority Over the Company's Universal Service Offering

Several parties urged the Commission to deny the application because the Company denied that the Commission had authority over the quality, terms and conditions, or affordability of its universal service offering. These parties contended that the Company, once designated an ETC, might renege on its commitments to providing affordable, high-quality service throughout its service area.

Of course, the critical issue is not what the Company believes to be the scope of the Commission's authority, but what *is* the scope of the Commission's authority. The Commission is satisfied that its authority over the Company's universal service offering is broad enough for it to ensure high-quality service and affordable rates throughout the Company's designated service area. (The authority issue is treated in detail below.)

Since the Commission has the authority to protect the Minnesota public, it need not seriously consider either of the two courses of action the parties recommended if it lacked that authority: (1) making a finding under 47 U.S.C. § 332 (c) (3) (A) that Minnesota Cellular's services are a substitute for land line communications for a substantial portion of the state, permitting this Commission to regulate its entry and rates, as well as its other terms and conditions of service; or (2) making a finding that this Commission lacks the jurisdiction to act on Minnesota Cellular's ETC application and referring the matter to the FCC under 47 U.S.C. § 214 (e) (6).

VII. Frontier's Rural Telephone Company Claim

Frontier challenged the Company's proposal to serve exchanges within its service area, claiming that, since Frontier was a rural telephone company, the Act required the Company to serve its entire study area if designated an ETC. The Company agreed that it was obligated to serve the entire study area of every rural telephone company, but denied that Frontier was a rural telephone company. The Department concurred with Minnesota Cellular. The other parties took no position.

A. The Legal Standard

Under the Act, a company qualifies for the special protections of a rural telephone company under the following conditions:

The term "rural telephone company" means a local exchange carrier operating entity to the extent that such entity—

(A) provides common carrier service to any local exchange carrier study area that does not include either—

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.¹⁵

B. Positions of the Parties

Frontier based its claim to rural telephone company status on the final test, having less than 15% of its access lines in communities of more than 50,000. It stated that the only community of over 50,000 it served was Burnsville and that less than 15% of its access lines were in that city.

Minnesota Cellular and the Department claimed that Burnsville was not a "community" within the meaning of the Act, that the term had a broader meaning, such as a "metropolitan statistical area" identified by the Bureau of the Census. Using that definition, Frontier's access lines in Burnsville, Apple Valley, Lakeville, and Rosemount would be counted together, and they would exceed 15% of the Company's lines.

Minnesota Cellular and the Department also argued that it is Frontier's parent company, Frontier Corporation, that must meet the statutory test. All parties agreed that Frontier Corporation did not qualify.

C. Commission Action

The Commission rejects Frontier's claim to rural telephone company status for two reasons: (1) Frontier Corporation is the real entity at issue, and it fails the statutory test; and (2) more than 15% of even the smaller company's access lines are located within the Twin Cities metropolitan area, which is the relevant community under the Act.

¹⁵ 47 U.S.C. § 153 (37).

1. The Holding Company is the Relevant Entity and Fails the Test

The statutory phrase "local exchange carrier operating entity," the entity considered for rural telephone company status, is ambiguous. It can be interpreted in at least two ways – as describing a local exchange carrier operating in the field or as describing a larger organization operating a local exchange carrier. The Commission believes that the second interpretation is more consistent with the intent of Congress evinced throughout the Act.

The Act grants special protection to rural telephone companies at several points. Not only does it protect them in the ETC designation process, but it exempts them, at least initially, from the interconnection, resale, and unbundling duties imposed on non-rural carriers to usher in competition.¹⁶ These are significant exemptions that were not lightly granted. The Conference Report on a joint hearing on the Act explained the reasons for the exemption as follows:

The Senate intends that the Commission or a State shall . . . use this [rural exemption] authority to provide a level playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the [rural] company or carrier.¹⁷

The Commission finds that, not only does Frontier not need protection from large global or nationwide entities, it is such an entity itself.

Frontier is a wholly owned subsidiary of Frontier Corporation, which has long distance operations throughout the nation and local exchange operations in at least seven other states. It is not an isolated, stand-alone company with scant resources and meager knowledge of the dynamics of the competitive marketplace. The parent company clearly makes its managerial, technical, and even regulatory expertise available for the benefit of Frontier and its other subsidiaries.

In fact, Frontier's own witness on the rural telephone company issue testified that he was regulatory manager for 19 wholly owned subsidiaries of Frontier Corporation in seven states. Although he was on the payroll of Frontier Communications of Minnesota, his salary costs were apportioned between all 19 of the wholly owned subsidiaries he served.

Obviously, the parent company does not leave these 19 subsidiaries to their own devices; it centralizes services requiring special expertise and delivers them on its own terms. This arrangement itself is powerful evidence that it is the holding company whose interests are at issue, that it is the holding company that ultimately controls Frontier, and that is the holding company that should be considered the applicant for a rural telephone company exemption.

¹⁶ 47 U.S.C. §251 (f).

¹⁷ House Report, 104-458, p. 254 (January 31, 1996).

The Commission finds that in this case the rural telephone company test should be applied to Frontier Corporation, not Frontier Communications of Minnesota, Inc. Since no one claims the larger company meets the test, the application must be denied.

2. More than 15% of Frontier's Access Lines Are in a Community Over 50,000

The Commission also rejects Frontier's narrow reading of the term "community" to mean "municipality" and therefore rejects its claim that less than 15% of its access lines are in communities of more than 50,000 people.

Frontier serves four municipalities in the metropolitan area: Burnsville, Lakeville, Apple Valley, and Rosemount. The company claims each municipality is a community. Since only one - Burnsville - has a population of more than 50,000 people, and since less than 15% of Frontier's lines are in that city, Frontier claims to meet the "less than 15%" test. On the other hand, if Burnsville is considered part of a community that includes neighboring Lakeville, Apple Valley, and Rosemount, Frontier fails the "less than 15%" test.

The Commission believes that "community" has a broader meaning than "municipality," that Lakeville, Apple Valley, and Rosemount are part of the same community as Burnsville, and that Frontier fails the "less than 15%" test.

First, "municipality" is a very straightforward word with a very specific meaning. If Congress had meant "municipality," it would have said "municipality." Instead it said "community," a word with a much more expansive and elastic meaning.

Second, not only are the four metropolitan municipalities Frontier serves close neighbors, they are all part of the toll-free metropolitan calling area. They have long been assumed to be part of a larger community whose identity and interests coincide to the point that toll-free calling within the community is required.

Third, Frontier's reliance on the Commission's decision to align new area codes along municipal boundary lines is misplaced. In that case the Commission was forced to break the larger community, the metropolitan calling area, into smaller parts with separate area codes. Using municipal boundaries as boundary lines was a logical way to minimize the confusion that would inevitably accompany new area codes.

Finally, defining "community" to mean "municipality" here would not further, and would in fact contravene, the Act's goal of providing special protection to rural customers. The 50,000 population threshold is clearly intended to function as an indicator of rural status. Burnsville, Lakeville, Apple Valley, and Rosemount are not rural municipalities, but municipalities within a recognized and thriving metropolitan area, unified by toll-free calling. Finding that access lines in these municipalities were access lines located in communities under 50,000 people would not square with the meaning and purpose of the Act.

For all these reasons, the Commission concludes that Frontier fails the "less than 15% of access lines in communities of more than 50,000" test.

VIII. Rural Telephone Company Public Interest Test

A. The Legal Standard

While the Act *requires* state commissions to designate qualifying applicants as ETCs in most cases, that is not true for areas served by rural telephone companies. For those areas, state commissions must first make a finding that designating more than one ETC would be in the public interest:

... Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). *Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.*¹⁸

B. Positions of the Parties

1. MIC, Frontier, RUD-OAG, and U S WEST

MIC, Frontier, RUD-OAG, and U S WEST urge the Commission to find that it would not be in the public interest to designate Minnesota Cellular an ETC in areas served by rural telephone companies.

They claim that competition in these areas would create strong economic incentives for the incumbents to defer investment in infrastructure, jeopardizing service quality and delaying the arrival of new technology and new services. They also claim that losing revenues to Minnesota Cellular, either through lost federal subsidies or lost customer billings, could drive up prices for the remaining customers. They cautioned that competition could drive some rural telephone companies out of business, stranding rural customers with Minnesota Cellular's fixed wireless service, which they contended was less reliable and less versatile than land line service.

These parties also challenged Minnesota Cellular's ability and intention to provide high quality, reliable service at affordable rates throughout its proposed service area. This final challenge has already been addressed in section VI.

2. The Department and Minnesota Cellular

The Department of Commerce and Minnesota Cellular claimed that it was in the public interest to designate Minnesota Cellular an ETC in the areas served by rural telephone companies. They emphasized that competition normally brings lower prices, higher quality, consumer choice, new technologies, and innovative services. They argued that none of the rural telephone companies had produced hard financial data showing that they would suffer any harm from competition.

¹⁸ 47 U.S.C. § 214 (e) (2), emphasis added.

They pointed out that current FCC universal policies permit both the incumbent *and* Minnesota Cellular to receive universal service subsidies for customers taking service from both companies. They emphasized that rural companies, like their urban counterparts, were seeing significant increases in customers ordering second lines, creating a significant source of new revenue, which might even offset the financial effects of lines lost to Minnesota Cellular.

C. Commission Action

The Commission finds that it is in the public interest to designate Minnesota Cellular an ETC in the portions of its proposed service area that are served by rural telephone companies.

The Commission begins with the understanding that both Congress and the Minnesota Legislature are deeply committed to opening local telecommunications markets to competition. At the same time, Congress realized that some areas served by rural telephone companies might not be able to support more than one carrier. In these areas competition, especially competition fueled by universal service subsidies, could harm consumers. Congress therefore gave state commissions the authority to determine on a case-by-case basis which areas served by rural telephone companies could not tolerate or benefit from competition.

In this case parties on both sides of the issue claimed that the other had a duty to come forward with empirical evidence that permitting Minnesota Cellular to compete for universal service funds would or would not harm consumers in the areas at issue. The Commission agrees with MIC that Minnesota Cellular had the burden of making an initial showing that subsidy-fueled competition would not harm consumers. The Commission also agrees with Minnesota Cellular that once the Company made that showing it was incumbent upon the rural telephone companies to produce facts demonstrating that consumers in individual areas served by individual companies would be harmed by granting ETC status to Minnesota Cellular. In this case, the evidentiary issue was not close.

Minnesota Cellular produced credible evidence of its intent and its ability to provide a new form of local service, fixed wireless service, throughout its proposed service area. It made a threshold showing of affordability, reliability, and service quality. It made a threshold showing that its service would include specific features and enhancements not available, or available only at a premium, from the incumbents.

This is credible evidence supporting the claim that designating Minnesota Cellular an ETC is in the public interest. It demonstrates that at least three of the goals underlying federal and state policies favoring competition – customer choice, innovative services, new technologies – would be served by facilitating Minnesota Cellular's entry with universal service subsidies. Given the Company's promised pricing of plus or minus 10% of incumbents' rates, it also provides powerful evidence that other goals – lower prices, higher quality, greater efficiency – might also be served.

The rural telephone companies responded basically with statements of general economic theory. They argued that they would face powerful incentives to stop investing in infrastructure for fear of not recouping investments and that this failure to invest would lead to lower service quality. They feared that Minnesota Cellular would capture so many customers that they would have to raise rates to their remaining customers. They cautioned that their remaining customers would probably be lower-income than the more affluent customers drawn to Minnesota Cellular's high-end services.

They stated that the designation of a second ETC would give them the right to relinquish their own ETC status and exit the service area. This, they said, would leave customers in the precarious position of having only wireless service, which is not rate-regulated and cannot support advanced data transmission requirements.

The Commission does not believe that customers in the areas served by the rural telephone companies will be harmed by permitting Minnesota Cellular to receive universal subsidies. In fact, the Commission believes that they will benefit.

First, it is simply not credible to conclude that roughly one-third of this state (the geographical area Minnesota Cellular seeks to serve) cannot support competitive telecommunications markets. That conclusion flies in the face of the area's technological sophistication and economic strength. Clearly, any inability to support competition would occur on a company-specific and area-specific basis.

Second, the rural telephone companies presented no facts demonstrating that consumers served by any particular rural company would be harmed by Minnesota Cellular's entering the market. Their witness could not identify any particular company that he had studied for the adverse effects of designating a second ETC. He could not state which specific companies' service areas had insufficient market demand and growth to support multiple providers. He stated that he had never analyzed an actual scenario with multiple ETCs in a high-cost rural area.¹⁹ He conceded that it was possible that revenues from the growing market for new services and second lines could offset the loss of revenues created by multiple providers.²⁰

The rural telephone companies presented no individual or aggregate data on total revenues, total expenses, total earnings, ability to reduce expenses, projected income from new services, or projected income from additional lines. They did not identify how many customers, or how much subsidy, any company could lose before being forced to raise rates, cut back on investment, or relinquish ETC status. The Commission would need this sort of evidence, or evidence equally probative, to conclude that it was not in the public interest to grant Minnesota Cellular ETC status for any particular area.

Third, the general arguments raised in opposition to granting Minnesota Cellular ETC status are not convincing. Even the incumbents claim, for instance, that many customers will take service from Minnesota Cellular as a supplement to land line service instead of as a substitute. In those cases the incumbents will continue receiving universal service subsidies, since the subsidy follows the line, not the customer.

Further, arguments from general economic theory cut both ways. It is not self-evident that telephone companies serving rural areas cannot survive competition from wireless providers. For example, although competition *could* produce a disincentive to invest in infrastructure (for fear of being unable to recoup the investment), it could also spark investment in infrastructure (to provide superior service to beat the competition). Similarly, competition could perform its widely recognized function of motivating the incumbents to find and implement new operating efficiencies, lowering prices and offering better service in the process.

¹⁹ Hearing Transcript, Volume 2, at 74-76.

²⁰ Hearing Transcript, Volume 2 at 76 and Volume 3 at 72-74.

Finally, the Commission considers the risk of any of the incumbents going out of business (other than through a merger or an acquisition) extremely small, highly speculative, and ultimately manageable. The rural companies' witness testified that none of them had plans to relinquish their ETC designation or withdraw service in the event that Minnesota Cellular's application were granted.²¹

No matter how successful Minnesota Cellular's offering, it is unlikely to gut the incumbents' revenues and universal service subsidies, since few customers will abandon the land line network altogether, at least in the foreseeable future. It is also not clear that relinquishing ETC status, which the incumbents can clearly do under the federal Act, would relieve them of carrier of last resort obligations under Minnesota law.

Even if it did, however, and even if one or more of the incumbents stopped providing service, the Commission, Minnesota Cellular, and interested parties would have the statutory twelve-month waiting period to determine how to deal with that development. Minnesota Cellular would have a duty to serve every customer within the service area, and the Commission would have the authority to require Minnesota Cellular to purchase or construct the facilities necessary to ensure adequate service.²²

The Commission would also have the authority to regulate Minnesota Cellular's rates and impose all the other conditions imposed on competitive local exchange carriers, upon finding that the Company's service was a substitute for land line service for a substantial portion of the communications within the state.²³ In short, even the abandonment of service scenario, although highly speculative and unwelcome, does not threaten severe and irrevocable harm to consumers.

For all these reasons, the Commission finds that it is in the public interest to designate Minnesota Cellular an eligible telecommunications carrier in the areas served by rural telephone companies.

IX. Commission Authority Over Minnesota Cellular's Universal Service Offering

Initially, Minnesota Cellular claimed that in evaluating its application the Commission was limited to considering the factors explicitly listed in 47 U.S.C. § 214 (e) – common carrier status, ability to offer all FCC-mandated services with at least some of its own facilities, compliance with advertising requirements – and could not consider service quality, affordability, or other public interest issues. This position had some support in FCC rules barring states from imposing any ETC eligibility requirements that did not appear in § 214 (e) (2).

This was problematic because, as a wireless carrier, Minnesota Cellular was not subject to the state service quality and pricing rules that applied to all other carriers. This raised the possibility of Minnesota Cellular being essentially unaccountable for its universal service offering.

²¹ Hearing Transcript, Volume 3 at 77.

²² 47 U.S.C. § 214 (e) (4).

²³ 47 U.S.C. § 332 (c) (3) (A).

Other parties countered that references in § 214 (e) (2) to the public interest and universal service principles made the public interest and universal service principles legitimate criteria in evaluating ETC applications. They also claimed that the Commission had authority under state law to consider affordability, service quality and similar public interest criteria.

In the alternative, these parties argued that if Minnesota Cellular were correct, the Commission in reality had no jurisdiction over Minnesota Cellular and should refer the application to the FCC under 47 U.S.C. § 214 (e) (6) (giving the FCC jurisdiction over ETC applications from carriers not subject to state jurisdiction).

This controversy was settled by the Fifth Circuit Court of Appeals, which invalidated the FCC rules barring state commissions from applying state criteria in ETC designations.²⁴ The Court interpreted the mandatory, discretion-limiting language in the statute as referring to *how many* ETCs a state commission was to designate, not to its criteria for designating them.

Minnesota Cellular continued to maintain, however, that this Commission could not consider service quality and affordability in evaluating its application, because there were no existing regulatory requirements on service quality or affordability applicable to wireless carriers. The Company also maintained that considering affordability ran afoul of the federal prohibition on state regulation of wireless rates²⁵ and of the state law exempting radio common carriers from the definition of "telephone company."²⁶ The Commission disagrees.

A. Statutory Authority to Apply Public Interest Criteria

While it is true that state rules on ETC designation were written with land line carriers in mind and apply only to them, the Commission has clear authority under state and federal law to apply normal public interest standards to this application. Minnesota Cellular's suggestion that the Commission must wear blinders and resist considering the public interest is without merit.

Under state law the Commission has comprehensive authority over the provision of telecommunications services in this state. It has a specific legislative mandate to consider eight state goals as it "executes its regulatory duties with respect to telecommunications services." Those regulatory duties would clearly include the duty to designate ETCs. The eight goals the Commission is to consider are as follows (emphasis added):²⁷

²⁴ Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir. July 30, 1999).

²⁵ 47 U.S.C. § 332 (c) (3).

²⁶ Minn. Stat. § 237.01, subd. 2.

²⁷ Minn. Stat. § 237.011.

- (1) *supporting universal service;*
- (2) *maintaining just and reasonable rates;*
- (3) encouraging economically efficient deployment of the infrastructure for higher speed telecommunications services and greater capacity for voice, video, and data transmission;
- (4) encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner;
- (5) *maintaining or improving quality of service;*
- (6) promoting customer choice;
- (7) ensuring consumer protections are maintained in the transition to a competitive market for telecommunications service; and
- (8) encouraging voluntary resolution of issues between and among competing providers and discouraging litigation.

The Commission also has a specific legislative mandate, when issuing orders related to telecommunications matters that affect deployment of the infrastructure, to apply the goal of just and reasonable rates.²⁸ Neither of these legislative directives is limited to dockets involving telephone companies or telecommunications carriers; both apply generally to all telecommunications matters. The Commission concludes that it is authorized and bound to consider these goals in examining this application.

The Commission also agrees with the Department that the federal Telecommunications Act of 1996, which authorizes it to make ETC designations, authorizes it to apply the public interest goals articulated in the Act in making those designations. The universal service goals of the Act include a statement that "quality services should be available at just, reasonable, and affordable rates."²⁹

The Act also makes it clear that state commissions bear major responsibility for ensuring that universal service rates are affordable: "The [Federal Communications] Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable."³⁰

B. State Statutory Definitions Do Not Deprive Commission of Authority

Minnesota Cellular pointed to the definitions section of the Minnesota telecommunications act to support its claim that the Commission lacked authority over its universal service offering. Those definitions state that radio common carriers are not telephone companies and that telephone company activities that conform to the act's definition of radio common carriers are not regulated under the act.³¹

²⁸ Minn. Stat. § 237.082.

²⁹ 47 U.S. C. § 254 (b) (1).

³⁰ 47 U.S.C. § 254 (i).

³¹ Minn. Stat. § 237.01, subds. 2 and 4.

Expanding these provisions beyond their literal meaning, by suggesting that they demonstrate that radio common carriers are uniquely beyond the jurisdiction of the Commission, is unwarranted. This is especially true in light of more recent legislation subjecting radio common carriers to state universal service fund obligations,³² and in light of the legislation discussed above, directing the Commission to apply specified goals in the broad contexts of "telecommunications services" and "telecommunications matters."

The Commission does not believe that the Legislature intended these definitions to place wireless carriers receiving public universal service subsidies outside the reach of Minnesota universal service policies.

C. The Commission is Not Preempted from Requiring Affordable Rates of Minnesota Cellular

Minnesota Cellular also claimed that federal law preempted the Commission from requiring that its universal service offering be affordable. The Commission disagrees.

While 47 U.S.C. § 332 (c) (3) clearly bars states from regulating wireless entry or wireless rates except in carefully defined circumstances, requiring a threshold showing of affordability to qualify for a public subsidy is not rate regulation. Rate regulation is much more precise and thoroughgoing than merely requiring a demonstration that rates fall within an affordable range.

Furthermore, if states cannot require a showing of affordability of wireless carriers, they cannot fulfill their responsibility, shared with the FCC, to ensure that universal service "is available at rates that are just, reasonable, and affordable."³³ The Commission concludes that it is not preempted from considering affordability in acting on Minnesota Cellular's application.

X. Conclusion

The Commission will grant preliminary approval to Minnesota Cellular's application, finding that the Company has made a credible showing of its ability and intention to provide a high quality, affordable universal service offering throughout its proposed service area. Final approval will be granted upon Commission review and approval of a tariff filing complying with the requirements discussed in the body of this Order.

ORDER

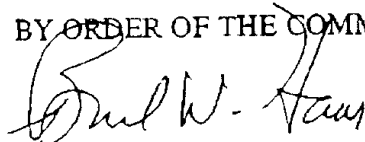
1. The Commission grants preliminary approval to Minnesota Cellular's application for designation as an eligible telecommunications carrier. Final approval is contingent upon Commission review and approval of the compliance filing set forth in paragraph 2.

³² Minn. Stat. § 237.16, subd. 9.

³³ 47 U.S.C. § 254 (i).

2. Minnesota Cellular shall make a compliance filing including the following items:
 - (a) a tariff containing a detailed description of its universal service package offering, which shall include at least one package which includes both unlimited local usage or the minimum level of local usage set by the FCC and a price that does not exceed 110% of the current rates of the incumbents;
 - (b) a plan for advertising its universal service offering(s) throughout its proposed service area;
 - (c) a proposed customer service agreement for Commission review and analysis with and against existing Commission service quality standards.
3. All parties to this proceeding are invited to comment on the Company's tariff filing, under a schedule to be established by the Executive Secretary. The Company shall respond to parties' comments under the same schedule.
4. Upon final designation as an eligible telecommunications carrier, the Company shall file quarterly progress reports on its efforts to implement enhanced 911 service and toll limitation service.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

CERTIFICATE OF SERVICE

I, Kristi Jones, do hereby certify that I have caused 1) the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be filed electronically with the FCC by using its Electronic Comment Filing System, 2) hard copies and a diskette copy of the **COMMENTS** to be served, via hand delivery, upon the persons listed on the attached service list (those marked with a number sign), 3) a courtesy copy of the **COMMENTS** to be served, via hand delivery, upon the persons listed on the attached service list (those marked with an asterisk), 4) a copy of the **COMMENTS** to be served, via first class United States mail, postage prepaid, upon all other persons listed on the attached service list.

Kristi Jones
Kristi Jones

December 17, 1999

*William E. Kennard
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Gloria Tristani
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Michael K. Powell
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Harold Furchtgott-Roth
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Susan P. Ness
Federal Communications Commission
8th Floor
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Lawrence E. Strickling
Federal Communications Commission
Room 5-C345
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Irene Flannery
Federal Communications Commission
Accounting Policy Division
Portals II
445 12th Street, S.W.
Washington, DC 20554

*Richard D. Smith
Federal Communications Commission
Accounting Policy Division
Portals II
445 12th Street, S.W.
Washington, DC 20554

#Sheryl Todd
Federal Communications Commission
Room 5-B540
Portals II
445 12th Street, S.W.
Washington, DC 20554

#International Transcription
Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036

(including 3x5 inch diskette w/cover letter)

(3 copies)

Gene DeJordy
Western Wireless Corporation
Suite 400
3650 131st Avenue, S.E.
Bellevue, WA 98006

Michele C. Farquhar
David L. Sieradzki
Ronnie London
Hogan & Hartson, LLP
555 13th Street, N.W.
Washington, DC 20004-1109

WWC

Steve Ellenbecker
Steve Furtney
Kristin H. Lee
Wyoming Public Service Commission
Suite 300
Hansen Building
2515 Warren Avenue
Cheyenne, WY 82002

CC96-45ggg-el.doc
Last Update: 12/17/99